Supreme Court, U.S.
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No. _____

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1999

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,

Petitioners,

UNITED STATES OF AMERICA

Intervenor,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Congress have the power under the Fourteenth Amendment to prohibit states from charging victims of discrimination fees for measures designed to remedy the discrimination?

2. Is Title II of the Americans with Disabilities Act within Congress' power to enforce the Fourteenth Amendment?

PARTIES

The parties to the proceedings for which review is sought are those appearing on the caption. This case was brought as a class action against the North Carolina Division of Motor Vehicles ("DMV") by Willie M. Brown, David S. Bagley, Joan Bagley, Orris Cross and Russell Anderson on behalf of all persons who purchased placards from DMV allowing use of accessible parking. The district court did not reach the issue of class certification.

The United States intervened in the proceedings before the Fourth Circuit Court of Appeals.

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Petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 12, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is published at 166 F.3d 698 (4th Cir. 1999) and reprinted in the Appendix beginning at p. A-1.

The opinion of the district court is published at 987 F.Supp. 451 (E.D.N.C. 1997) and reprinted in the Appendix beginning at p. A-25.

STATEMENT OF JURISDICTION

The Court of Appeals rendered its decision on February 12, 1999. Rehearing and rehearing en banc were denied without opinion, over three dissents, on May 11, 1999. (A-45) On August 2, 1999, the Chief Justice extended the time for the filing of this petition until September 8, 1999.

This Court has jurisdiction to review the judgment of the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case presents questions as to whether Congress has the power to enforce Section 5 of the Fourteenth Amendment by requiring states to provide nondiscriminatory treatment for persons with disabilities and prohibiting states from imposing fees for reasonably equivalent access. The questions involve Section 5 of the Fourteenth Amendment; the Eleventh Amendment; the prohibition against disability discrimination by public entities in the Americans with Disabilities Act of 1990 ("ADA") at 42 U.S.C. § 12132; the ADA's abrogation of Eleventh Amendment immunity at 42 U.S.C. § 12202; the ADA regulations codified at 28 C.F.R. § 35.130(f); and North Carolina General Statues § 20-37.6. The relevant constitutional provisions, statutes and regulations are reproduced in the Appendix beginning at p. A-47.

STATEMENT OF THE CASE

Petitioners/Plaintiffs, Willie M. Brown, David S. Bagley, Joan Bagley, Orris Cross, and Russell Anderson ("Plaintiffs"), on behalf of themselves and all others similarly situated, filed suit against the North Carolina Division of Motor Vehicles ("DMV") in the United States District Court for the Eastern District of North Carolina, challenging a North Carolina law, N.C. Gen. Stat. § 20-37.6(c), that requires individuals with disabilities to pay a fee for placards to gain access to parking. Plaintiffs alleged that the placard fee violates 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(f).

DMV moved to dismiss Plaintiffs' complaint, arguing that the abrogation of Eleventh Amendment immunity for ADA claims in 42 U.S.C. § 12202 is invalid because the application of the ADA to the States exceeds Congressional authority under Section 5 of the Fourteenth Amendment. The District Court agreed, and dismissed Plaintiffs' case.

Plaintiffs timely appealed the order of dismissal to the United States Court of Appeals for the Fourth Circuit, which affirmed the dismissal with a published opinion dated February 12, 1999, with one dissent. The Fourth Circuit found that the prohibition of fees on access is not within Congress' Section 5 power, and so held that the Eleventh Amendment abrogation with respect to the regulation is invalid.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision -- that Congress lacks authority under Section 5 of the Fourteenth Amendment to prohibit the States from charging a fee for access required by the ADA -- merits review because the panel decided an important federal question in a way that conflicts with relevant decisions of this Court, and that conflicts with the decisions of other courts of appeals.

I. CONGRESS HAS THE POWER UNDER THE FOURTEENTH AMENDMENT TO PROHIBIT STATES FROM CHARGING VICTIMS OF DISCRIMINATION FEES FOR MEASURES DESIGNED TO REMEDY THE DISCRIMINATION.

Title II of the ADA prohibits state and local governments from discriminating against persons with disabilities, or otherwise acting to exclude persons with disabilities from the benefit of any government service, program, or activity. 42 U.S.C. § 12132. Pursuant to its authority under 42 U.S.C. § 12134, the United States Department of Justice promulgated regulations for the implementation of the ADA. The regulations require the provision of parking accommodations for persons with disabilities so as to allow reasonably equivalent access to public and private facilities. See, e.g., 23 C.F.R. pt. 36, App. A, § 4.6.2.

Regulations implementing Title II include a specific prohibition of any fee on rights of access provided by the ADA:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this Part.

28 C.F.R. § 35.130(f).

Despite Title II of the ADA and 28 C.F.R. § 35.130(f), North Carolina continues to require persons with disabilities to pay a $5.00 fee for a placard permitting the holder to park in specially designated parking spaces set aside for persons with disabilities. N.C. Gen. Stat. § 20-37.6(c).

Each plaintiff satisfies the criteria for a parking placard, has been required to pay a placard fee, and is an individual with a disability within the meaning of the ADA. On behalf of themselves and others similarly situated, the Plaintiffs contend that the placard fee violates the ADA and its implementing regulations.

Rejecting the Plaintiffs' claims, the Court of Appeals for the Fourth Circuit struck down the regulation that prohibits states from imposing surcharges:

> [W]e hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a

> constitutionally valid exercise of power, and the effort to abrogate must fail.

(A-13)

In promulgating 28 C.F.R. § 35.130(f), the Department of Justice imposed limited restrictions on the states so as to ensure reasonably equivalent access for individuals with disabilities. In his dissent, Judge Murnaghan accurately described the regulation that the majority held to be "beyond the remedial scope" of Congress' Section 5 power:

> [B]y its terms § 35.130(f) only applies to surcharges imposed on the disabled to cover the cost of measures taken "to provide that [disabled] individual or group with the nondiscriminatory treatment required by this Act or this Part." All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims. The very terms of the regulation provide for no more than that.
>
> . . .
>
> The regulation at issue here, which was promulgated by the Department of Justice pursuant to the ADA, merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group). Therefore, § 35.130(f) does not expand the rights of the disabled, but

> merely prevents a state from adding insult to injury by making the disabled pay for the correction of the injuries inflicted over the years.

(A-21-22)

The panel decision would permit states to undermine the ADA by imposing surcharges on individuals with disabilities whenever they use public services. Under the ADA, may a state charge people in wheelchairs a 50-cent fee to use a ramp to enter a public building? May a state require the blind to deposit a quarter before using an elevator that has been equipped with Braille numbers? Surely Congress has the authority under Section 5 to prohibit such facially discriminatory exactions.

Judge Murnaghan's conclusion summarizes what is at stake:

> Viewed in its proper light, § 35.130(f) not only is constitutional, but merely states expressly that which is intuitive. It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights

> Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

(A-24)

The regulation is a simple, reasonable measure to prevent public entities from limiting access by requiring payment of money. To rephrase Chief Justice Marshall's aphorism in McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L.Ed. 579 (1819), the power to charge a fee on access is the power to destroy the right of access. Congressional power under Section 5 to require accessibility for persons with disabilities, just as any other power under Section 5, necessarily includes the power to prohibit any monetary exaction that would interfere with or burden the rights to be enforced.

The majority opinion describes North Carolina's placard fee system as "a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities." (A-18) Elsewhere, the majority characterizes the $5.00 placard fee as "the most modest of all possible fees." (A-20) Contrary to the Fourth Circuit's suggestion, the size of the placard fee does not remove it from the scope of Congressional power to enforce the Fourteenth Amendment. In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966),this Court invalidated, as a denial of equal protection, an annual $1.50 poll tax imposed by Virginia on all residents over 21. The surcharge at issue here is more invidious than that rejected in Harper because the state in this case has imposed the placard fee exclusively on the victims of discrimination. It would be as if Virginia, responding to the Voting Rights Act of 1965, imposed a registration fee of $1.50 on new African-American voters "to

recoup the costs" of adding previously disenfranchised citizens to the voting rolls. If Congress prohibited such a registration fee, this Court would presumably find that Congress acted within its Section 5 authority, despite the "modest" size of the fee.

"It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." City of Boerne v. Flores, 117 S.Ct. 2157, 2172 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).

In considering whether Congress acted within its Section 5 authority, the Fourth Circuit did not examine the ADA as a whole, but instead focused narrowly on the particular regulation upon which the Plaintiffs base their claims. The panel's narrow-focus approach is not supported by any precedent and is inconsistent with the approach taken by every other appellate court. All of the other cases that have considered Eleventh Amendment challenges to the ADA have analyzed the statute as a whole, instead of engaging in the kind of piecemeal dissection undertaken by the panel in this case. See cases cited in § II, infra at pp. 10-11. The panel's narrow-focus analysis undermines the deference granted to Congress and disregards the "congruence and proportionality" test prescribed in Boerne. City of Boerne v. Flores, 117 S.Ct. at 2164. The Court in Boerne recognized that the line between permissible remedial legislation and substantive definitional legislation will often be difficult to draw, but that "Congress must have wide latitude in determining where it lies." Id. at 2164. The Fourth Circuit's narrow-focus analysis ignores these fundamental precepts, and instead invites courts to engage in the most intrusive form of judicial legislation.

The regulation at issue here is a reasonable and proportionate means to secure equal access for individuals with disabilities. In invalidating the regulation, the Fourth Circuit improperly restricted Congress' broad Section 5 authority. The Court should review the Fourth Circuit decision, and restore the proper balance between judicial and Congressional power.

II. TITLE II OF THE ADA IS WITHIN CONGRESS' POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

The district court held that, in enacting the ADA, Congress exceeded its powers under Section 5 of the Fourteenth Amendment. Basing its decision on the constitutionality of 28 C.F.R. § 35.130(f), the Fourth Circuit did not pass on the constitutionality of the statute itself. Because the Plaintiffs' claims hinge on the constitutionality of both the statute and the regulation, this appeal presents the question of whether Title II of the ADA exceeds Congress' Section 5 powers, an issue that has divided the circuit courts.

Six circuit courts have held unequivocally that Congress' statutory abrogation of Eleventh Amendment immunity in the ADA is a valid exercise of its Section 5 enforcement powers. Martin v. Kansas, 1999 WL 635916 (10th Cir. August 19, 1999); Muller v. Costello, 1999 WL 599285 (2d Cir. August 11, 1999); Kimel v. Florida Board of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), cert. granted on other grounds, 109 S.Ct. 901-02 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), cert. denied, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998); Crawford v. Indiana Department of Corrections, 115 F.3d 481, 487 (7th Cir. 1997). See also

Corrections, 115 F.3d 481, 487 (7th Cir. 1997). See also Torres v. Puerto Rico Tourism Company, 175 F.3d 1, 6 n. 7 (1st Cir. 1999) (declining to address the issue but stating: "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision.").

One circuit court disagrees. In a recent 6-4 en banc decision, the Court of Appeals for the Eighth Circuit held that extending Title II of the ADA to the states was not a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment. Alsbrook v. City of Maumette, No. 97-1825, 1999 WL 521709 (8th Cir. July 23, 1999) (en banc) (cert. petition filed on September 7, 1999).

The Fourth Circuit has straddled the fence. After the panel decision in this case ("Brown"), a different panel of the Fourth Circuit found the enactment of the ADA to be within Congress' power under Section 5. Amos v. Maryland Department of Public Safety and Correctional Services, 178 F.3d 212, 218 (4th Cir. June 24, 1999). The majority in Amos found that Brown did not control because that decision "considered the validity of a specific regulation promulgated under the ADA, and not the constitutionality of the ADA itself as applied to state agencies." Id. at 221, n.8. In dissent, Judge Williams endorsed the reasoning in Brown, argued that the Brown decision should control in Amos, and concluded that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in attempting to abrogate the states' sovereign immunity in the ADA. Id. at 229-30.

The question of the validity of Congress' abrogation of Eleventh Amendment immunity in the ADA is now pending on petitions for certiorari from the decision of the Eleventh

Circuit in Kimel and from the decision of the Eighth Circuit in Alsbrook. Plaintiffs ask the Court to grant this petition and resolve the circuit conflict on this important question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

September 8, 1999

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APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	No. 97-2784
UNITED STATES OF AMERICA,	)	
Intervenor,	)	
v.	)	
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh
Terence W. Boyle, District Judge
(CA 5:96-CV-689-BO(1))

Argued: October 26, 1998
Decided: February 12, 1999

Before WILKINSON, Chief Judge, MURNAGHAN, Circuit Judge, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Chief Judge WILKINSON wrote the majority opinion, in which Judge MOON joined. Judge MURNAGHAN wrote a dissenting opinion.

COUNSEL

ARGUED: Seth Michael Galanter, United States Department of Justice, Washington, D.C., for Intervenor. Stephen Russell Senn, Peterson & Meyers, P.A., Lakeland, Florida, for Appellants. James Peeler Smith, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellee. **ON BRIEF**: Bill Lann Lee, Acting Assistant Attorney General, Jessica Dunsay Silver, United States Department of Justice, Washington, D.C., for Intervenor. J. Davis Connor, Peterson & Meyers, P.A., Lakeland, Florida; Robert Joseph Antonello, Robert G. Fegers, Antonello & Fegers, Winter Haven, Florida; Melinda Lawrence, Burton Craige, Leto Copeley, Patterson, Harkavy & Lawrence, L.L.P., Raleigh, North Carolina, for Appellants. Michael F. Easley, North Carolina Attorney General, Hal F. Askin Special Deputy Attorney General, C. Norman Young, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellee.

OPINION

WILKINSON, Chief Judge:

Five purchasers of North Carolina handicapped parking placards sued the state Division of Motor Vehicles (DMV) on behalf of themselves and all those similarly situated to recover a five dollar fee the state charged for the placard. Plaintiffs claimed the fee violated 28 C.F.R. § 35.130(f), promulgated under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12134. That regulation prohibits public entities from charging a fee to cover the costs of accessibility programs designed to assist the disabled.

The district court found that in passing the ADA, Congress exceeded its powers under Section 5 of the Fourteenth Amendment, and thus Congress could not abrogate sovereign immunity under the test set forth in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Because we find that under *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), 28 C.F.R. § 35.130(f) exceeds Congress' Section 5 powers, we affirm the district court's dismissal of this suit for want of subject matter jurisdiction.

I.

Since 1972 the state of North Carolina has provided a system of handicapped parking for its disabled citizens. *See* An Act to Provide Special Parking Privileges for Disabled Persons, ch. 374, 1971 N.C. Sess. Laws 305. The state has continuously maintained and updated that system in the ensuing decades. *See, e.g.*, An Act to Clarify the Law Pertaining to Parking Privileges for the Handicapped, ch. 632,

1979 N.C. Sess. Laws 662; An Act to Provide for the Enforceable Designation of Handicapped Parking Signs, ch. 843, 1987 N.C. Sess. Laws 2031. The current system allows persons with mobility impairments to obtain special license plates and removable windshield placards. N.C. Gen.Stat. § 20-37.6(b) & (c). These plates and placards permit the holder to park in any parking space reserved for handicapped persons. *Id.* § 20-37.6(a). To receive a placard, an applicant must provide medical certification of mobility impairment. *Id.* § 20-37.6(c1). The placard is valid for five years and is renewable. *Id.*

North Carolina law further provides that the DMV "may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard." *Id.* § 20-37.6(c). In accordance with this provision, the DMV charges five dollars for the placard--a fee equal to one dollar a year--to recover the costs of administering the program. From 1990 to 1996, the DMV issued some 573,450 parking placards to assist its citizens with disabilities.

Nearly twenty years after North Carolina began providing for handicapped parking, Congress passed the Americans with Disabilities Act, Pub.L. No. 101-336, 104 Stat. 327 (1990). Title II of the ADA requires that no disabled person, "by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II delegates authority to the Attorney General to promulgate implementing regulations within one year after the ADA's effective date. *Id.* § 12134. Pursuant to that grant, the Department of Justice promulgated rules requiring the creation of handicapped accessible parking spaces. 28 C.F.R.

§§ 35.150-.151; *id.* pt. 36, app. A; *see also id.* § 36.304. The Department's regulations further require that

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

Id. § 35.130(f).

Appellants are persons with disabilities who paid a five dollar fee to the DMV to receive a placard. On August 7, 1996, they filed suit in the Eastern District of North Carolina challenging, on behalf of themselves and all others similarly situated, the legality of the fee under 28 C.F.R. § 35.130(f). Appellants sought a declaration that the fee was unlawful and an injunction against its continued imposition. They also requested the repayment with interest of all fees illegally charged. The DMV interposed Eleventh Amendment sovereign immunity. In response, appellants argued that Congress, acting pursuant to Section 5 of the Fourteenth Amendment, abrogated that immunity when it passed the ADA. Neither party argued that the regulation was *ultra vires.*

The district court held that the Eleventh Amendment barred this suit. *Brown v. North Carolina Div. of Motor Vehicles*, 987 F.Supp. 451 (E.D.N.C.1997). The court found that Congress clearly intended to abrogate state sovereign immunity. *Id.* at 454-55. Nevertheless, the court held that

Congress could not do so because Title II of the ADA exceeded its remedial power under Section 5 of the Fourteenth Amendment. First, the court held that the ADA impermissibly mandated that disabled individuals were entitled to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 457-458. Second, the district court stated that the ADA was not remedial legislation at all, but instead created an entitlement for the especial advantage of disabled citizens. *Id.* at 458-59. Finding that Congress therefore failed to properly abrogate Eleventh Amendment immunity, the district court dismissed the suit for lack of subject matter jurisdiction. The placard holders appeal, and the United States has intervened.

II.

A.

The Eleventh Amendment provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the text of the Amendment seems to restrict only the scope of diversity jurisdiction in federal court, the Amendment has long been interpreted to contain much broader limitations. In *Hans v. Louisiana*, the Supreme Court recognized that the "suability of a State without its consent" was "not contemplated by the Constitution when establishing the judicial power of the United States." 134 U.S. 1, 15, 16, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Since that time, the Court has reaffirmed this important principle of federalism embodied in the Eleventh Amendment. *See Seminole Tribe*, 517 U.S. at 54 n. 7, 116 S.Ct. 1114 (listing cases); *Booth v. Maryland*,

112 F.3d 139, 141-42 (4th Cir.1997) (reviewing the case law). State sovereign immunity includes the proposition that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

The Supreme Court has held that Congress has a limited power to abrogate immunity. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Congressional abrogation of immunity must meet two requirements: Congress must "unequivocally express[ ] its intent to abrogate the immunity," and Congress must act "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985); *accord Seminole Tribe*, 517 U.S. at 55, 116 S.Ct. 1114.

To determine whether Congress has acted pursuant to a valid exercise of power, a court must ask, "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" *Seminole Tribe*, 517 U.S. at 59, 116 S.Ct. 1114. This inquiry itself has two components. First, the congressional action must be taken pursuant to a provision that entails the power to abrogate. For example, in *Seminole Tribe*, the Court held that Congress' Article I authority to regulate interstate and Indian commerce does not include the power to abrogate a state's Eleventh Amendment immunity. *Id.* at 59-73, 116 S.Ct. 1114; *see also In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1145 (4th Cir.1997) (noting that "Congress' powers under Article I cannot be construed to empower it to expand federal jurisdiction by abrogating the states' sovereign immunities"), *cert. denied*, --- U.S. ----, 118 S.Ct. 1517, 140 L.Ed.2d 670 (1998). The Fourteenth Amendment, on the

other hand, does include the power to abrogate--the Supreme Court has held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 456, 96 S.Ct. 2666 (citation omitted).

Second, the statute seeking to abrogate immunity must be constitutional. In the context of a purported exercise of the Section 5 power, this requirement means that a court must ensure that Congress was actually "acting pursuant to § 5 of the Fourteenth Amendment." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). If the scheme at issue exceeds the Section 5 power, it is without jurisdictional effect and cannot constitutionally abrogate immunity. *See Autio v. AFSCME, Local 3139*, 140 F.3d 802, 804-06 (8th Cir. 1998) (deciding constitutionality of congressional enactment in determining whether immunity was abrogated), *aff'd by an equally divided court*, 157 F.3d 1141 (8th Cir.1998) (en banc); *Coolbaugh v. Louisiana*, 136 F.3d 430, 433-38 (5th Cir.1998) (same), *cert. denied*, --- U.S. ----, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir.1997) (same), *cert. denied*, --- U.S. ----, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). In examining whether Congress abrogated Eleventh Amendment immunity, a court must "be able to discern some legislative purpose or factual predicate that supports the exercise of [the Section 5 power]. That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'...." *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). But the law must be supportable under Section 5 to be a valid exercise of power and effect an abrogation of state sovereign immunity.

B.

The parties disagree over what this review for constitutionality entails. The United States as intervenor argues that in reviewing a scheme purporting to abrogate state sovereign immunity, courts are to look broadly at the entire statutory framework--here Title II of the ADA--and ratify its constitutionality without looking at the validity of its individual provisions or the agency regulations promulgated under its authority. The government urges this court to examine the scheme in toto to see generally whether it is an effort to rectify discrimination that some group has suffered in the past. *See, e.g., Clark*, 123 F.3d at 1270 (holding the ADA to be a valid exercise of power after noting the connection between its antidiscriminatory aim and past discrimination). Because Title II encompasses such a general antidiscriminatory purpose, the government would have us go no further.

We disagree. To begin with, the broad-brush review proposed by the government requires courts to ratify unnecessarily the constitutionality of every provision in the title. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 104, 65 S.Ct. 152, 89 L.Ed. 101 (1944); *see also Ashwander v. TVA*, 297 U.S. 288, 345-48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Even if such a look is preliminary and cursory, its breadth is fundamentally at odds with separation of powers values.

Additionally, broad-look review raises difficult questions of administrability. In conducting that review, what is a court to do when it finds parts of a title constitutional and other parts unconstitutional? The temptation, of course, is to depart from broad-brush review in those cases and look specifically at the particular provision whose alleged violation gave rise to the lawsuit. But that leads to results that are no different from those obtained by examining the specific statute in the first instance.

Most importantly, the broad-look review urged upon us by the government glosses over the crucial federalism concerns that animate the Eleventh Amendment. Because the "abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,' " *Dellmuth v. Muth*, 491 U.S. 223, 227, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (quoting *Scanlon*, 473 U.S. at 238, 105 S.Ct. 3142), courts must exercise great care before finding abrogation. "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis omitted). "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Id.* For that reason, the Supreme Court has consistently erected hurdles to a finding that Eleventh Amendment immunity does not bar suit. *See, e.g., Edelman*, 415 U.S. at 673, 94 S.Ct. 1347 (requiring express language or overwhelming implication before finding waiver); *Scanlon*, 473 U.S. at 243, 105 S.Ct. 3142 (requiring an unequivocal textual expression of congressional intent before finding abrogation).

Looking broadly at an entire title would leave under protected these important state interests in immunity. Ratifying an entire title and finding abrogation without examining the actual, specific legal basis for suit could subject a state to suit in federal court pursuant to an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme. Such a jurisprudence--one leading to sweeping validations of abrogation--would be completely discordant with the doctrine of dual sovereignty.

Moreover, sovereign immunity analysis in cases brought to enforce an agency regulation ought not end with the authorizing statute. Reviewing only the statute at issue--and ignoring the regulation whose alleged violation by the state gave rise to the action--would lead to the abrogation of immunity in cases even where the agency rule was unconstitutional or beyond the bounds of delegated authority. This is so because the statute itself--which may speak only in general terms--may be facially constitutional, despite the fact that the regulations promulgated under it are unconstitutional. Whether Congress acts directly in the form of a detailed statutory framework or whether it acts indirectly by broadly delegating to an agency the authority to promulgate detailed regulations is without import for Eleventh Amendment immunity. Focusing only upon the statute and ignoring the regulation would artificially hinge the weighty structural protections of state sovereign immunity upon a congressional choice of rulemaking efficacy.

Nor do the safeguards of federalism wither in the face of an overzealous bureaucracy intent upon imposing its will on the states. Regulations that unjustifiably intrude "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *Boerne*,

117 S.Ct. at 2171, are invalid exercises of power. Just as the Eleventh Amendment does not leave states without a shield when they confront congressional acts, states are not rendered defenseless in their duels with government by bureaucracy.

Reasons of separation of powers, administrability, and federalism thus dictate a searching review of the legal basis for suit. In determining whether Eleventh Amendment immunity is abrogated in a case involving a regulation, we first ask whether Congress intended to abrogate immunity. Then, in determining whether it was acting pursuant to a valid exercise of power, we examine the legality of the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court.

III.

We now proceed to apply this immunity test to this case. Appellee, as a department of the state, is immune from suit unless Congress has abrogated that immunity. *See Pennhurst*, 465 U.S. at 100, 104 S.Ct. 900. No party to this case contests that the first prong of the abrogation analysis is met. In passing the ADA, Congress made it "unmistakably clear" that it intended to abrogate sovereign immunity. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment ...from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

The question remains, therefore, whether the statute and regulation at issue were adopted pursuant to a valid exercise of congressional power. In passing the ADA, Congress made clear that it was invoking its powers under Section 5 of the Fourteenth Amendment. The ADA lists

among its purposes "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment..., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The mere invocation of the Section 5 power, however, is not dispositive. To abrogate, the statute and regulation must also be constitutional exercises of that power. Here, we hold that 28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it is not a constitutionally valid exercise of power, and the effort to abrogate must fail.

A.

Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Included in that article, of course, is the Equal Protection Clause. The Supreme Court in *City of Boerne v. Flores* held that "Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment.... The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." 117 S.Ct. at 2164. In other words, Congress has the power to remedy violations of constitutional rights, not to define the substance of those rights.

But the line between remedial and definitional exercises of the Section 5 power is often a fine one and "Congress must have wide latitude in determining where it

lies." *Id.* "[Section] 5 is a positive grant of legislative power," *Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), and courts owe substantial deference to Congress when it seeks to remedy constitutional violations. Congress not only has the power to craft remedies that draw constitutional violations within their ambit, it also has the power to act prophylactically in response to persistent and pervasive constitutional violations. *See Boerne*, 117 S.Ct. at 2167. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional...." *Id.* at 2163.

Despite these broad powers, "the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation." *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (opinion of Black, J.); *see also Creative Goldsmiths*, 119 F.3d at 1146 ("[Section] 5 of the Fourteenth Amendment does not grant Congress a plenary power."). Section 5's own text suggests limitations which protect the federal balance: Congress may "enforce, by appropriate legislation." The yardstick used to measure whether an exercise of the congressional enforcement power is "appropriate" -- that is, whether it is remedial and not definitional -- was set forth in *Boerne*: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 117 S.Ct. at 2164. The end targeted must be "constitutional violations" or laws many of which "have a significant likelihood of being unconstitutional." *Id.* at 2163, 2170. And the means employed must be congruent and proportional

to any such violation. Unless the enactment is tailored to remedy particular constitutional violations, Congress lacks the power to invade the "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick*, 427 U.S. at 455, 96 S.Ct. 2666.

B.

Applying the congruence and proportionality test, appellant argues that 28 C.F.R. § 35.130(f) is entirely constitutional because it seeks only to enforce the Equal Protection Clause's ban on laws motivated by arbitrary and irrational discrimination. Appellant urges that in passing the ADA Congress found widespread discrimination and prejudice against individuals with disabilities. Congress noted that those individuals suffer from "stereotypic assumptions not truly indicative of ... individual ability" and from discrimination "in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a). Congress concluded that disabled persons "occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." *Id.* The United States as intervenor adds that the regulation is congruent and proportional because it seeks to prevent those laws most likely to be the result of invidious discrimination.

We disagree. Under *Boerne*, Section 5 enactments must target unconstitutional state action. The Constitution, however, has given state governments significant latitude in dealing with problems of disability. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87

L.Ed.2d 313 (1985), the Supreme Court held that classifications made on the basis of mental retardation need only satisfy a standard of rational basis review. The Court rejected the suggestion that mental retardation is a quasi-suspect classification, stating that "the distinctive legislative response, *both national and state*, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 443, 105 S.Ct. 3249 (emphasis added). The Court further noted that this "legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless." *Id.* at 445, 105 S.Ct. 3249. Rational basis review thus "affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.* at 446, 105 S.Ct. 3249. Given the Supreme Court's rationale, we cannot extend to the physically disabled a different standard of protection from that given to the mentally disabled. *Accord Autio*, 140 F.3d at 806 (noting that disability classifications are not entitled to heightened scrutiny); *Coolbaugh*, 136 F.3d at 433 n.1 (same); *Clark*, 123 F.3d at 1270 (same). The constitutionality of state laws affecting the disabled must thus be measured by rational basis review.

It is true, of course, that even rational basis review places limitations on states that Congress may seek to enforce. Irrational classifications or laws motivated by the desire to harm an unpopular group fail rational basis scrutiny.

Bankers Life & Cas. Co v. Crenshaw, 486 U.S. 71, 83, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review."); *see also Romer v. Evans*, 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Cleburne*, 473 U.S. at 446-47, 105 S.Ct. 3249. Thus, the validity of 28 C.F.R. § 35.130(f) turns in part upon whether Congress sought to remedy a specific unconstitutional state of affairs; that is, whether the end targeted was arbitrary state action or state action motivated by animus.

In passing the ADA, Congress did make substantial findings about many forms of discrimination against the disabled in American life. 42 U.S.C. § 12101(a). But general findings of discrimination alone, as regrettable and unfortunate as that state of affairs may be, do not justify denying state governments the basic ability to provide for their own citizens' health and welfare. Instead, Congress can intrude upon state prerogatives only when seeking to remedy or prevent particular constitutional violations. The Supreme Court has explained that Section 5 legislation will be upheld where it "rest[s] on unconstitutional discrimination by [a state] and Congress' reasonable attempt to combat it." *Boerne*, 117 S.Ct. at 2168. Animus "in the air," however, does not permit Congress to effect a wholesale redistribution of power between the states and the central government.

Here Congress, through the Attorney General, acted to ban state surcharges designed to recover the costs of programs provided for the benefit of disabled persons. Such an act is only sustainable under the Section 5 power if many of those surcharges "have a significant likelihood of being unconstitutional." *Id.* at 2170. In view of the efforts of

states to assist the handicapped, including the admirable efforts of North Carolina which are at issue here, that likelihood is not apparent to this court. Nor has any party pointed us to any support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class. It may well be that some subset of those surcharges is in fact so motivated. But on the record before us, we can only believe that most fees are like that imposed by North Carolina law--a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities. Such a fee is rationally based and perfectly constitutional under *Cleburne*.

Admittedly, Congress may act prophylactically if it faces a "subsisting and pervasive discriminatory -- and therefore unconstitutional -- use of" surcharges. *Id.* at 2167. But the prophylactic measures must still be congruent and proportional to the underlying unconstitutional state action. Section 35.130(f), like the statute at issue in *Boerne*, is not so tailored. The restrictions imposed by 28 C.F.R. § 35.130(f) "apply to every agency and official of the ... State[ ] and local Governments. [The regulation] applies to all ... state law, statutory or otherwise, whether adopted before or after its enactment. [It] has no termination date or termination mechanism. Any [surcharge] is subject to challenge at any time by any individual" with a disability. *Id.* at 2170 (citations omitted). Section 35.130(f) "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* Absent such congruence and proportionality, section 35.130(f) is best understood as definitional, not remedial, and therefore is beyond Congress' power under Section 5.

By imposing a ban on all surcharges, the regulations are definitional in an even more fundamental way. They attempt to create a positive entitlement to a free handicapped parking space. While such an undertaking may be commendable, it is a function of the state police power; nothing in the Constitution requires it. And federal regulations imposing it--when not congruent and proportional to unconstitutional state action--seek to redefine the Equal Protection Clause, transforming it from a prohibition on invidious state action into a charter of positive rights. Such a step, however, is beyond the scope of the Fourteenth Amendment. See *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (declining to find a right to "decent, safe, and sanitary housing" in the Equal Protection Clause).

Our holding that Congress, through the Attorney General, acted definitionally is reinforced by evidence in the statutory scheme itself. A congressional attempt to redefine the holding of *Cleburne* abounds. For example, in *Cleburne*, the Supreme Court declared that the mentally disabled were a "large and diversified group" and "doubt[ed] that the predicate for [heightened scrutiny] is present." *Cleburne*, 473 U.S. at 442-43, 105 S.Ct. 3249. The ADA, by contrast, specifically takes issue with the Court's definitional choice and declares that "individuals with disabilities are a discrete and insular minority." 42 U.S.C. § 12101(a)(7). This declaration evinces an intent not to remedy violations of the standard of *Cleburne*, but rather to effect a "substantive alteration of its holding." *Boerne*, 117 S.Ct. at 2171. In striking state legislation that is clearly rationally grounded, Congress sought to do what *Cleburne* said it may not do-- establish a new suspect or quasi-suspect equal protection classification.

IV.

The facts of this case demonstrate how far the structure of dual sovereignty has been distorted. North Carolina has maintained a long-standing program designed to benefit disabled persons through the provision of special parking spaces. In order to make the program effective, the state undertook to provide placards to those who were eligible to use the spaces. To cover the cost of the placards, North Carolina introduced the most modest of all possible fees--one dollar a year. A federal agency now seeks to deny the state even that meager option in administering the state's voluntary enforcement efforts. The United States further insists that the state may be called to answer for this alleged transgression in federal court. We hold, however, that the Eleventh Amendment forbids this course. To interpret Section 5 to abrogate the state's immunity would be a mark of profound constitutional disrespect to the role that states are meant to play within our federal system.* The judgment of the district court is hereby

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

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* Deciding this case on the basis of the constitutionality of 28 C.F.R. § 35.130(f), we need not pass on 42 U.S.C. § 12132 itself. And, holding that this case was rightfully dismissed for lack of jurisdiction, we do not reach the question whether 28 C.F.R. § 35.130(f) is a constitutional exercise of an Article I enumerated power. These and other issues remain if this matter is refiled in a state court with subject matter jurisdiction.

Because I believe that the ADA provision is a reasonable and valid exercise of Congress' powers pursuant to Section 5 of the Fourteenth Amendment, I respectfully dissent.

The majority opinion has detailed the applicable law with respect to Congress' ability to abrogate the states' sovereign immunity, and I need not recount that in great detail here. However, I question the majority's application of that law to 28 C.F.R. § 35.130(f.

First, I note that there is absolutely no basis to conclude that § 35.130(f) is anything like the now discredited RFRA. Unlike RFRA, the provisions of which applied to "laws ... [and] official actions of almost every description and regardless of subject matter," *see Boerne*, 117 S.Ct. at 2170, § 35.130(f) by its terms applies only to a certain class of laws (laws authorizing fees or surcharges) that in turn apply only to a certain class of people (the disabled). *See* 28 C.F.R. § 35.130(f). Moreover, by its terms § 35.130(f) only applies to surcharges imposed on the disabled to cover the cost of measures taken "to provide that [disabled] individual or group with the nondiscriminatory treatment required by this Act or this part." *Id.* All § 35.130(f) really stands for, then, is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims. The very terms of the regulation provide for no more than that.

Second, it troubles me to reach the notion that Congress cannot protect the disabled from discrimination because of the deferential rational basis standard of review accorded to state legislation. *See Clark*, 123 F.3d at 1271 (concluding that the standard of review to which state

legislation is subjected should not define Congress' boundaries for its enforcement powers under § 5). When Congress finds that invidious discrimination has plagued a class of people, it may act to ensure that the class receives equal protection under the law. See Amend XIV, § 5; *Ex parte Virginia*, 100 U.S. at 345-46. Congress has some discretion in how it chooses to respond to the problem, since "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision." *Boerne*, 117 S.Ct. at 2170.

As the Supreme Court made clear in *Cleburne*, the disabled, while not considered a suspect class, may not be subjected to arbitrary and invidious discrimination. *See* 473 U.S. at 446-47, 105 S.Ct. 3249. Here, Congress has made substantial findings that the disabled are subjected to just that type of discrimination in numerous arenas. *See* 42 U.S.C. § 12101 (1990). In response to that discrimination, Congress enacted the ADA, which has been found constitutional by all circuits that have reviewed it. *See Clark*, 123 F.3d at 1270-71 (9th Cir.1997); *Coolbaugh*, 136 F.3d at 438 (5th Circuit); *Autio*, 140 F.3d at 806, *aff'd by an equally divided court*, 157 F.3d 1141 (8th Cir.1998). The regulation at issue here, which was promulgated by the Department of Justice pursuant to the ADA, merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group). Therefore, § 35.130(f) does not expand the rights of the disabled, but merely prevents a state from adding insult to injury by making the disabled pay for the correction of the injuries inflicted over the years.

Finally, § 35.130(f) does not purport to provide the disabled with a "free" parking space. What few comments the Department of Justice made regarding § 35.130(f) indicate

that the measure was only designed to cover surcharges for services that the state was under an obligation to provide. *See* 28 C.F.R. Pt. 35, App. A (1998). The brief comments discussing § 35.130(f) relate to a request for clarification of the ability to charge for courtroom interpreters. *See id.* In response to the request, the Department adopted the standard set forth in its regulations pursuant to § 504 of The Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West Supp.1998), and stated that where the court system is obligated to provide an interpreter, it cannot charge the litigant. *See* 28 C.F.R. Pt. 35, App. A. The import of that statement is clear: where there is no obligation to provide an interpreter (or any other service), the state is under no obligation to pay for it.

The comments accompanying an identical provision in the ADA regulations applicable to public accommodations make it even clearer that the bans on surcharges found in the regulations were not intended to be broad-based bans on all surcharges applicable to the disabled but merely limited tools to help facilitate the remedial aims of the ADA. *See* 28 C.F.R. Pt. 36, App. B (1998). Like § 35.130(f), 28 C.F.R. § 36.302(c)(1998) prohibits an entity (public accommodations here) from "impos[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures ... that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." *Id.* The Department notes that it was asked whether daycare centers could charge fees for services rendered in addition to those required by the ADA, and it made clear that 28 C.F.R. § 36.302(c) "is intended only to prohibit charges for measures necessary to achieve compliance with the ADA." 28 C.F.R. Pt.36, App. B. Therefore, the bans on surcharges embodied in § 35.130(f)

and like provisions are not intended to redefine the rights of the disabled by guaranteeing them free access to services but are remedial measures designed to ensure that the disabled are not charged for services required to provide them with the level of treatment accorded to nondisabled persons.

Viewed in its proper light, § 35.130(f) not only is constitutional, but merely states expressly that which is intuitive. It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them. Therefore, I would reverse the district court's decision that it lacked subject matter jurisdiction to hear the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
WESTERN DIVISION

No. 5:96-CV-689-BO(1)

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON,	)	
Plaintiffs,	)	
v.	)	ORDER
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant.	)	

This matter is before the Court on Plaintiffs' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Defendant's Motion to Dismiss, pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules. In the underlying action the named Plaintiffs, on behalf of a putative class, challenge the imposition of a fee for the issuance of parking placards which allow the use of parking spaces reserved for disabled persons. Plaintiffs allege that the fees charged by Defendant North Carolina Division of Motor Vehicles (hereinafter, the "DMV") violate the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. ("ADA"), and regulations issued thereunder. Upon

consideration of the parties' arguments, and for the reasons discussed below, Defendant's Motion to Dismiss is GRANTED, and Plaintiff's Motion for Summary Judgment is dismissed as moot.

BACKGROUND

The named Plaintiffs in this matter suffer mobility impairments which satisfy the criteria for the issuance of a parking placard under North Carolina law. *See* N.C.Gen.Stat. §§ 20-37.5, 20-37.6. Each Plaintiff has purchased a parking placard for a five dollar fee, allowing him access to disabled parking spaces.

The creation of specially designated handicapped parking spaces close to the entrance to buildings is required by the North Carolina State Building Code, N.C.Gen.Stat. § 20-37.6, and by federal law, *see* 28 C.F.R. Pt. 36, App. A, § 4.6.2. North Carolina issues handicapped parking license plates and portable handicapped parking windshield placards to people with mobility impairments, allowing holders of such license plates and placards to use the reserved parking spaces. N.C.Gen.Stat. § 20-37.6(d), (f).

The North Carolina General Statutes detail the qualifications for obtaining a handicapped parking plate or placard. Among the impediments which qualify for issuance of a plate or placard are mobility impairments which prevent a person from walking 200 feet without stopping to rest or walking without the use of a cane or other assistive device. N.C.Gen.Stat. § 20-37.5(2). Also included are persons restricted by severe lung disease or who use portable oxygen; persons who have severe cardiac conditions, severely limited mobility due to arthritic, neurological, or orthopedic conditions; or persons who are severely visually impaired. Id.

It is not disputed that the named Plaintiffs qualify for issuance of the handicapped parking plates or placards under North Carolina law.

Qualifying persons apply for a handicapped placard by completing a North Carolina DMV application, obtaining a physician's signature, and paying the required fee. A handicapped plate, in contrast to the placards, may be issued only to a qualifying car owner. N.C.Gen.Stat. § 20-37.6(b). The plate is issued for the normal fee applicable to standard license plates. Id. According to the DMV, the placards are issued with far greater frequency than the license plates. Pl. Ex. 9.

The North Carolina General Assembly has provided that the DMV "may charge a fee sufficient to pay the actual cost of issuance [of the placard], but in no event less than five dollars ($5.00) per placard." N.C.Gen.Stat. § 20-37.6(c). The fees received by the DMV are paid into a "Highway Fund," and the expenses incurred are paid out of that fund. Deposition of Carol Howard, Director of Vehicle Registration (hereinafter, the "Howard Depo."), at 28.

Plaintiffs filed a complaint on August 7, 1996, charging that the North Carolina DMV scheme violates their rights under the ADA, and seeking a declaratory judgment. Defendant served its answer on September 26, 1996. Defendant subsequently amended its answer by leave of this Court. On July 11, 1997, both parties filed potentially dispositive motions: Defendant served a Motion to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, and Plaintiffs served a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

ANALYSIS

Eleventh Amendment "Sovereign Immunity"

Defendant asserts that this Court cannot entertain Plaintiff's claims because this action is barred by the Eleventh Amendment to the United States Constitution, which, it argues, bestows sovereign immunity upon the DMV, as an agency of the State of North Carolina. The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

By its words, of course, the Eleventh Amendment does not even invoke the principle of "sovereign immunity." Rather, the Amendment seems to limit the "Judicial power" of the United States bestowed upon the Judiciary by Article III of the Constitution. In Section 2 of that Article the Framers wrote: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl.1. The Constitution then elucidates nine fonts of judicial power, nine distinct but sometimes overlapping ways in which "Cases" may arise to invoke the judicial power of the United States. The last six categories are determined by the status of the parties involved. Among these are "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Id.

In this context, the Eleventh Amendment simply strips the Federal Courts of jurisdiction to hear suits against States

brought by citizens of another State or citizens of a foreign nation. The Supreme Court has dramatically broadened the scope of the Eleventh Amendment's reach, however, creating immunity even in cases clearly outside the plain language of the Amendment. Since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), the Supreme Court has held that the Eleventh Amendment bars a citizen from bringing suit against his own State in federal court, even though the express terms of the Amendment do not so provide. It is well-established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 113 S.Ct. 684, 687, 121 L.Ed.2d 605 (1993). Such immunity, of course, applies equally to a state agency, such as the DMV here, which is considered an "arm of the State." *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572-73, 50 L.Ed.2d 471 (1977); *Metcalf & Eddy*, 506 U.S. at 144, 113 S.Ct. at 688 ("[A] State and its 'arms' are, in effect, immune from suit in federal court.").

Thus, "for over a century [the Supreme Court has] reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, ___, 116 S.Ct. 1114, 1122 (1996) (quoting *Hans*, 134 U.S. at 15, 10 S.Ct. at 507).[1] This principle now applies whether the State is sued by its own citizens or those of other states, and whether it is the State itself being sued or an

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[1] For a thorough list of the Supreme Court's decisions affirming *Hans*, see *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, ___, 116 S.Ct. 1114, 1122 n. 7 (1996).

agency thereof, notwithstanding the express words of the Constitution.

Such a view is compatible with a notion that the Eleventh Amendment was grounded on the concept of complete state sovereign immunity. In fact, the result in *Hans* is mandated if the Eleventh Amendment is understood that way: "[I]f noncitizen suits are barred in law and equity, there is simply no good reason not to extend sovereign immunity to citizen and admiralty suits." Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1476 (1987). The problem, of course, is that this result is achieved only by ignoring the words of the Amendment, which makes it seem unlikely that the Eleventh Amendment was written for any purpose other than limiting the nine fonts of federal judicial power delineated in Article III.

Obviously this Court has not the power to overturn 120 years of Supreme Court precedent. It can, however, hew rigidly to the limits on the construction of Eleventh Amendment jurisprudence that the Supreme Court has laid down in the years since *Hans*. Under that line of cases Plaintiffs must clear two hurdles in order to overcome the DMV's assertion of sovereign immunity. First, Plaintiff must show that "Congress has 'unequivocally expressed its intent to abrogate the immunity,' and second, [that] Congress has acted 'pursuant to a valid exercise of power.'" *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1123 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)).

A. Congress' Unequivocal Expression of Intent to Abrogate Sovereign Immunity

This first inquiry is critical, as it reflects the central role played by the Eleventh Amendment in our Federal constitutional structure. "[B]ecause the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States, [the Supreme Court] consistently has held that these exceptions [to sovereign immunity] apply only when certain specific conditions are met. Thus, we have held that a State will be deemed to have waived its immunity 'only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.'" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-240, 105 S.Ct. 3142, 3145-3146, 87 L.Ed.2d 171 (1985) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1361, 39 L.Ed.2d 662 (1974) internal quotations omitted)).

The *Atascadero* Court went on to hold that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." 473 at 246, 105 S.Ct. at 3149. Congress provided the requisite language in Section 502 of the ADA: "A State shall not be immune under the Eleventh Amendment to the Constitution from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

This, by itself, does not suffice. Clearly, Congress intended to abrogate the Eleventh Amendment, but it cannot simply avoid the reach of that amendment by saying that it intends to do so. It must be acting pursuant to a valid grant of congressional authority. Thus, the Court must now

examine the second prong of the *Seminole Tribe* test, and ask whether Congress was acting "pursuant to a valid exercise of power." *Green v. Mansour*, 474 U.S. at 68, 106 S.Ct. at 426. Of course, as the Supreme Court has recognized, there are "certain well-established exceptions to the reach of the Eleventh Amendment." *Id.* at 238, 105 S.Ct. at 3145. Section 5 of the Fourteenth Amendment to the Constitution provides such an exception, giving Congress the power "to enforce, by appropriate legislation, the substantive provisions of the Fourteen Amendment." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).[2]

B. The Enforcement Clause of the Fourteenth Amendment Is Not a Source of Authority to Abrogate States' Sovereign Immunity

Congress explicitly drew upon the Fourteenth Amendment in the ADA, stating that the purpose of the law was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

Section 5 of the Fourteenth Amendment is, of course, "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the

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[2] In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), a plurality of the Supreme Court found that the Interstate Commerce Clause also supported congressional abrogation of the Eleventh Amendment. This decision was overruled by *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1128, however, leaving the Fourteenth Amendment as the only recognized source of power to support such an abrogation.

Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 650, 86 S.Ct. 1717, 1723-1724, 16 L.Ed.2d 828 (1966).

The substantive clause of the Fourteenth Amendment, § 1, provides, in pertinent part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. xiv. In acting pursuant to its "positive grant" of power under § 5 of the Fourteenth Amendment, Congress may only enforce the provisions of § 1. In other words, § 5 is not a grant of plenary power to Congress; it is a grant of power created to enforce, and limited by, the objectives of the Fourteenth Amendment. Thus, as the Supreme Court has recently emphasized, "[t]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based upon the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *City of Boerne v. Flores*, ___ U.S. ___, ___, 117 S.Ct. 2157, 2162, 138 L.Ed.2d 624 (1997) (quoting *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803)).

Congress' power to enforce the Fourteenth Amendment is broad. In *Ex parte Virginia*, 100 U.S. 339, 345-346, 25 L.Ed. 676 (1879), the Supreme Court described the reach of the legislative power under § 5: "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

But Congress does not have unlimited discretion to act under the Fourteenth Amendment merely because it invokes that provision of the Constitution. "As broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (opinion of Black, J.). As the Court said recently, "Congress' power under § 5, however, extends only to enforcing the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 326, 86 S.Ct. 803, 817-818, 15 L.Ed.2d 769 (1966)).

In the *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), the Supreme Court had an early opportunity to define the remedial scope of the Fourteenth Amendment. In the course of invalidating provisions of the Civil Rights Act of 1875, the Court commented that § 5 did not bestow upon Congress the power to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. . . ." *Id.* at 13-14, 3 S.Ct. at 23. Speaking generally, the Court continued:

> The truth is that the implication of a power to legislate in this manner is based upon the assumption that if the states are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon

> Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the tenth amendment of the constitution, which declares that powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

Id. at 14-15, 3 S.Ct. at 24. The Court in *Boerne*, recently reemphasizing these fundamental ideas, noted that, while "the specific holdings of these early cases might have been superseded or modified, their treatment of Congress' § 5 power as corrective or preventive, not definitional, has not been questioned." ___ U.S. at ___, 117 S.Ct. 15 2166.

Indeed, the principles applied to the Fourteenth Amendment by the Court in the *Civil Rights Cases* were recognized by the Court as far back as its seminal decision in *McCulloch v. Maryland*, 17 U.S. 316, 4 L.Ed. 579 (1819). "The government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted." *Id.* at 405. This bedrock principle of our constitutional jurisprudence is even embedded in the Bill of Rights itself: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

It follows from these principles that if a federal statute -- here the ADA -- is to confer upon the Plaintiffs a right to

sue the State of North Carolina over nonenforcement, it must find some authority in the Constitution under which the states have ceded sovereignty over such affairs to the federal government. Thus, Congress' declaration in the ADA that it was acting pursuant to its authority under the Fourteenth Amendment does not, *ipso facto*, make its exercise of the legislative power valid.

The *Boerne* Court repeated the lessons of Fourteenth Amendment interpretation handed down since the *Civil Rights Cases*, saying that the "Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause." ___ U.S. at ___, 117 S.Ct. at 2164. The Fourteenth Amendment has been a powerful tool in protecting individuals from state action that infringes upon individual liberties. But this is where the ADA differs from the typical legislation passed pursuant to Congress' power under § 5 of the Fourteenth Amendment. First, the ADA protects a class of individuals -- the disabled -- who enjoy no heightened constitutional protections. Second, the ADA is not designed for remedial purposes, to promote the "equal protection of the laws" mandated by the Fourteenth Amendment. These arguments will be treated in order.

1. Congress Does Not Have the Power to Declare Heightened Scrutiny for Disabled Individuals as a Class It is well-established under the Supreme Court's equal protection jurisprudence that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982)). The analogue of that proposition, however, is equally true: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the

same." *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940) (quoted in *Plyler v. Doe*, 457 U.S. at 216, 102 S.Ct. at 2394).

In reviewing state legislation that is challenged as denying equal protection, the Supreme Court first decides what level of scrutiny the legislation demands. Thus, "when a statute classifies by race, alienage, or national origin," the Court applies "strict scrutiny" and the legislation "will be sustained only if [it is] suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. Similarly, when legislatures classify individuals based on their gender, a "heightened standard of review" is applied. *Id.*

Where, as here, Congress' invokes its power under § 5 of the Fourteenth Amendment, however, federal courts must invert the usual inquiry. The question becomes whether Congress is legislating to protect a class cognizable under § 1 of the Fourteenth Amendment. If not, even if it explicitly invokes it, Congress may not ground its action on the Fourteenth Amendment.

In the instant case, the ADA cannot be said to protect a class of individuals entitled to heightened constitutional protections. Before the enactment of the ADA, it was clear that the Supreme Court was not treating disabled individuals as a cognizable class entitled to heightened constitutional protections. In denying such treatment to the mentally retarded in *Cleburne*, the Court wrote: "[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part

of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so." *Id.* at 445, 105 S.Ct. at 3257. The same reasoning applies to the physically disabled as well.

Commentators and some courts have called into doubt the Supreme Court's approach to disabled individuals since the passage of the ADA in 1990. Some of this confusion no doubt stems from Congress' statement of the findings which contributed to the ADA, wherein it wrote: "[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals. . . ." 42 U.S.C. § 12101(a)(7).

By invoking the language of suspect classification, the now-familiar mantra of "discrete and insular minorities" from Footnote 4 of *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938), Congress may have been attempting to force the courts to treat the disabled as a suspect class for equal protection purposes. Even if Congress was trying to pressure the courts and the states, this Court remains cognizant of what the Supreme Court stated in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

However, it seems more likely that Congress was merely availing itself of its fact-finding powers and pointing out to the courts that the disabled have suffered historically in this country. This is well noted and not subject to dispute.

The Supreme Court is mindful of the distinction between Congress' powers under the Enforcement Clause and the constitutionally prescribed limits on those powers: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed." *Boerne*, ___ U.S at ___, 117 S.Ct. at 2164.

In striking down the Religious Freedom Restoration Act ("RFRA"), the *Boerne* Court was analyzing the question of religious liberty under the due process clause of the Fourteenth Amendment. Nevertheless, the Court's holding that Congress only has the power to enforce substantive protections, rather than to declare them, translates easily to the equal protection clause. *See Bartlett v. Bd. of Law Examiners*, 970 F.Supp. 1094, 1134 (S.D.N.Y. 1997) (holding that Congress would exceed its authority in attempting to alter the level of scrutiny afforded the disabled under the ADA). At bottom, "Congress does not enforce a constitutional duty by changing what the right is." *Boerne*, ___ U.S. at ___, 117 S.Ct. at 2164. So Congress cannot force the courts to adopt a new regime vis-a-vis the classification of individuals with disabilities.

This leaves Congress free to utilize its superior fact-finding abilities to suggest to the courts that disabled people should henceforth receive more constitutional protection. If, indeed, this is what Congress intended with the ADA, it is incumbent upon the Supreme Court to make that determination. The lower courts should merely interpret and apply the decisions of the Supreme Court, and it is not their role to reshape Supreme Court decisions in light of new information. The Supreme Court recently reminded lower

courts that "if a precedent of this Court has direct application in a case," the lower court should follow the earlier case, "leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989) (quoted in *Agostini v. Felton*, ___ U.S. ___, ___, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997)). Because the Supreme Court held in *Cleburne* that disabled people are not a class entitled to increased Fourteenth Amendment protection, this Court cannot now decide that Congress had the power to declare otherwise in the ADA. Thus, Congress is outside of its Enforcement Clause authority in attempting to abrogate North Carolina's sovereign immunity with the ADA.

2. The ADA Is Not Remedial Legislation; It Singles Out a Class for Special Treatment Another reason that the ADA is an inappropriate attempt by Congress' exercise its power under the Fourteenth Amendment is that the statute is not "remedial" in the same sense as are most anti-discrimination statutes enacted under the Enforcement Clause. Title VII of the Civil Rights Act of 1964 is a prototypical example of a statute which seeks a state of affairs where individuals are treated equally, without regard to race, sex, or age. The ADA, on the other hand, seeks to single out the disabled for special, advantageous treatment. In other words, the ADA demands entitlement to achieve its goals. This is beyond the purview of the Enforcement Clause as the concept of entitlements has little to do with promoting the "equal protection of the laws."

Of course, most legislation passed by Congress "discriminates," in some sense of the word, against classes of individuals. As the Supreme Court has said, upholding the constitutionality of an Oklahoma statute which treated

optometrists differently than ophthalmologists: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . The prohibition of the Equal Protection Clause goes no further than invidious discrimination." *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-89, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955).

More recently, the Court has said: "Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution." *Clements v. Fashing*, 457 U.S. 957, 967, 102 S.Ct. 2836, 2845, 73 L.Ed.2d 508 (1982). Inverting the analysis to apply to Congress' attempt to invoke the Equal Protection Clause to exercise its authority, the ADA does not remediate invidious, arbitrary, or irrationally made classifications. At least as concerns the public accommodation provisions at issue here, the ADA would force States to single out disabled individuals for advantageous treatment. This is not within Congress' power under the Fourteenth Amendment's Equal Protection Clause.

C. *Ex parte Young* Does Not Prevent the Operation of the Eleventh Amendment

In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court held that the Eleventh Amendment did not foreclose a suit to enjoin as unconstitutional the actions of a state official. "This holding was based on a determination that an unconstitutional state enactment is void and that any action by a state official that is purportedly authorized by that enactment cannot be taken in an official capacity since the state authorization for such

action is a nullity." *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939, 92 L.Ed.2d 209 (1986). In limiting the applicability of *Young* in the intervening years, the Supreme Court has held that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green v. Mansour*, 474 U.S. at 68, 106 S.Ct. at 426 (internal citations omitted).

The Plaintiffs in the instant matter are suing the DMV for repayment, with interest, of all sums charged for the disabled parking placards. Plaintiffs are seeking compensation for the previously charged five dollar fees; this action is thus not within the limits on the Eleventh Amendment denoted by *Ex parte Young*.

The oft-cited "rule" of *Edelman v. Jordan*, that the Eleventh Amendment bars suits against States for retroactive monetary relief, but not for prospective injunctive relief, 415 U.S. at 664-665, 94 S.Ct. at 1356-1357, is also inapplicable to the instant action. The decision in *Ex parte Young* was predicated on the notion that a suit challenging a state official's action is not, in effect, a suit against the state. This logic does not obtain when the suit is against the state itself or a state agency; it only applies when individual state officials are sued in their official capacity. When the State itself is sued, "the relief sought by a plaintiff . . . is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1124.

The Supreme Court discussed this at length in *Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982),

where it held that the administrator of an estate could not sue two states under the federal interpleader act for seeking to tax the estate on the basis of inconsistent claims. In *Cory*, the Court of Appeals for the Fifth Circuit had held that *Edelman* meant that the suit could proceed because the interpleader plaintiff had sought only prospective relief. 629 F.2d 397 (5th Cir. 1980). The Supreme Court explained: "*Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought." *Cory*, 457 U.S. at 90, 102 S.Ct. at 2328-2329.

Again, the instant case is not within the *Ex parte Young* confines. The Plaintiffs are suing the DMV itself, an arm of the State of North Carolina; they are not suing a state official. There is thus no question of invoking the legal fiction created by the Supreme Court in *Young*.

CONCLUSION

The Supreme Court in *Seminole Tribe* concisely summarized the nature of the Eleventh Amendment inquiry: The "inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?" 517 U.S. at ___, 116 S.Ct. at 1124. The end result of this reasoning, and the answer to this question, is that Congress improperly invoked the Fourteenth Amendment to facilitate the ADA's putative abrogation of the sovereign immunity of the States. Thus the Eleventh Amendment is a properly asserted defense for the North Carolina DMV in the instant action.

For the reasons discussed above, this action is barred by the Eleventh Amendment. Although it attempted to invoke its powers under the Fourteenth Amendment, Congress has not the authority to do so to effectuate the ends of the ADA. Because the State of North Carolina has not consented to suit under this statute, this Court lacks subject matter jurisdiction to hear this action, and it must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Defendant's Motion to Dismiss is GRANTED, and Plaintiffs' Motion for Summary Judgment is therefore rendered moot.

SO ORDERED.

This 28th day of November, 1997.

/S/
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 11, 1999

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs-Appellants,	)	No. 97-2784
	)	CA-96-689-5-BO
UNITED STATES OF AMERICA,	)	
Intervenor,	)	
v.	)	
NORTH CAROLINA DIVISION OF MOTOR VEHICLES,	)	
Defendant-Appellee.	)	

On Petition for Rehearing and Rehearing En Banc

Appellants filed a petition for rehearing with suggestion for rehearing en banc.

On the petition for rehearing before the panel, Judge Murnaghan voted to grant rehearing, and Chief Judge Wilkinson and Judge Moon (United States District Judge for the Western District of Virginia, sitting by designation) voted to deny rehearing. The petition for rehearing before the panel is thereby denied.

A member of the Court requested a poll of the Court on the suggestion for rehearing en banc, and a majority of the judges voted to deny rehearing en banc. Judges Murnaghan, Michael, and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Ervin, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler, and King voted against rehearing en banc.

It is ORDERED that the petition for rehearing and suggestion for rehearing en banc is denied.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 5 of the Fourteenth Amendment to the United States Constitution provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

42 U.S.C. § 12132 provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12202 provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Federal Regulation

28 C.F.R. § 35.130(f) provides:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this Part.

North Carolina Statute

North Carolina General Statutes § 20-37.6 provides:

> (a) General Parking.--Any vehicle that is driven by or is transporting a person who is handicapped and that displays a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard may be parked for unlimited

periods in parking zones restricted as to the length of time parking is permitted. This provision has no application to those zones or during times in which the stopping, parking, or standing of all vehicles is prohibited or which are reserved for special types of vehicles. Any qualifying vehicle may park in spaces designated as restricted to vehicles driven by or transporting the handicapped.

(b) Handicapped Car Owners; Distinguishing License Plates.--If the handicapped person is a registered owner of a vehicle, the owner may apply for and display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive one removable windshield placard.

(c) Handicapped Drivers and Passengers; Distinguishing Placards.--A handicapped person may apply for the issuance of a removable windshield placard or a temporary removable windshield placard. Upon request, one additional placard may be issued to applicants who do not have a distinguishing license plate. Any organization which, as determined and certified by the State Vocational Rehabilitation Agency, regularly transports handicapped persons may also apply. These organizations may receive one removable windshield placard for each transporting vehicle. When the removable windshield or temporary removable windshield placard is properly displayed, all parking rights and privileges extended to vehicles displaying a distinguishing license plate issued pursuant to subsection (b) shall apply. The removable

windshield placard or the temporary removable windshield placard shall be displayed so that it may be viewed from the front and rear of the vehicle by hanging it from the front windshield rearview mirror of a vehicle using a parking space allowed for handicapped persons. When there is no inside rearview mirror, or when the placard cannot reasonably be hung from the rearview mirror by the handicapped person, the placard shall be displayed on the driver's side of the dashboard. A removable windshield placard placed on a motorized wheelchair or similar vehicle shall be displayed in a clearly visible location. The Division shall establish procedures for the issuance of the placards and may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard.

(c1) Application and Renewal; Physician's Certification.--The initial application for a distinguishing license plate, removable windshield placard, or temporary removable windshield placard shall be accompanied by a certification of a licensed physician, ophthalmologist, or optometrist or of the Division of Services for the Blind that the applicant is handicapped. The application for a temporary removable windshield placard shall contain additional certification to include the period of time the certifying authority determines the applicant will have the disability. Distinguishing license plates shall be renewed annually, but subsequent applications shall not require a medical certification that the applicant is handicapped. Removable windshield placards shall be renewed every five years, and the renewal shall require a medical recertification that the person is

handicapped. Temporary removable windshield placards shall expire no later than six months after issuance. ...

Supreme Court, U.S.
FILED
SEP 30 1999
OFFICE OF THE CLERK

(2)

No. 99-424

IN THE UNITED STATES SUPREME COURT

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,

Petitioners,

UNITED STATES OF AMERICA

Intervenor,

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL REASON FOR GRANTING THE WRIT

On September 8, 1999, Petitioners/Plaintiffs ("Plaintiffs") filed the pending petition for writ of certiorari, seeking review of the Fourth Circuit decision, Brown v. North Carolina Division of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) ("Brown"). In Brown, the Fourth Circuit considered Plaintiffs' claim that a North Carolina law requiring persons with disabilities to pay a $5.00 fee for a parking placard violates the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. ("ADA") and its implementing regulation, 28 C.F.R. § 35.130(f). The Fourth Circuit rejected Plaintiffs' challenge to the placard fee, holding that 28 C.F.R. § 35.130(f) was not a constitutionally valid exercise of Congress' power to enforce the Fourteenth Amendment.

On September 16, 1999, the Ninth Circuit Court of Appeals issued its decision in Dare v. State of California, No. 97-56065, 1999 WL 717724 (9th Cir. Sept. 16, 1999), holding that California's $6.00 biennial fee for disability parking placards violates the ADA and 28 C.F.R. § 35.130(f). The Ninth Circuit decision is in direct conflict with Brown.

In Dare, the defendant State of California, while acknowledging the constitutionality of Title II of the ADA, claimed that "the prohibition in 28 C.F.R. § 35.130(f) against states charging even de minimis administrative fees violates the Fourteenth Amendment." 1999 WL 717724 at *7. The Ninth Circuit rejected California's argument:

> The primary flaw in the government's approach is that it conducts its Fourteenth Amendment analysis in a piecemeal manner. Because the statutory scheme as a whole

constitutes a proper exercise of Congress' power to legislate under § 5, see Clark [v. California], 123 F.3d at 1270-71, regulations promulgated pursuant to the ADA "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute.'" Does 1-5 [v. Chandler], 83 F.3d at 1153 (quoting United States v. Morton, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984)).

Here, the regulation is not arbitrary, capricious, or contrary to the ADA. See id. Title II protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled. See 42 U.S.C. § 12132. If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are paying fees others do not and so are not being treated equally.

Forbidding such additional charges is a solution aimed at preventing this type of discrimination; it addresses the improper approach to funding services for the disabled, see 28 C.F.R. § 35.130(f), while leaving states broad flexibility to administer and fund their programs otherwise, cf. Duprey v. State of Conn., Dept. of Motor Vehicles, 28 F.Supp.2d 702, 708 (D.Conn. 1998) ("If the DMV wants to pass on the costs of providing placards,

> rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."). The rationale for this regulation thus dovetails neatly with the purposes of Title II. We therefore hold that 28 C.F.R. § 35.130(f) has controlling weight.

Id. at *7-8 (footnote omitted).

The Ninth Circuit considered and expressly rejected the Fourth Circuit's reasoning in Brown:

> In taking this approach, we reject the reasoning of the Fourth Circuit in Brown, which determined that "separation of powers, administrability, and federalism" required an examination of "the legality of the specific statute and regulation whose asserted violation by the state government gave rise to the claim for relief in federal court." Brown, 166 F.3d at 705. In our view, a piecemeal analysis of the regulations would unduly constrain Congress's power to construct a statutory scheme addressing discrimination; the federal courts, in effect, would have a line-item veto over legislation directed at intentional or arbitrary discrimination by the states.

Id. at *7, n. 7 (emphasis added).

The Ninth and Fourth circuits now stand in direct conflict on an important issue regarding the proper balance between judicial and Congressional power. The first question in the pending petition for writ of certiorari squarely presents the issue. Plaintiffs respectfully request the Court to grant the petition so that the conflict may be resolved.

September 30, 1999

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In the
Supreme Court of the United States
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WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, and RUSSELL ANDERSON, on behalf of themselves and all others similarly situated,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. DOES AN IMPLEMENTING REGULATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990, WHICH REGULATION PROHIBITS A PUBLIC ENTITY FROM PLACING A SURCHARGE TO COVER THE COST OF MEASURES REQUIRED TO PROVIDE NONDISCRIMINATORY TREATMENT TO ANY PERSON OR GROUP OF PERSONS WITH DISABILITIES, PROHIBIT A STATE FROM CHARGING A MODEST FEE TO DEFRAY THE COST OF VOLUNTARILY PROVIDING "HANDICAPPED" WINDSHIELD PLACARDS TO MOBILITY IMPAIRED PERSONS SO THAT VEHICLES TRANSPORTING THEM MAY PARK IN SPACES RESERVED FOR SUCH VEHICLES?

2. IF SO, IS THE REGULATION A VALID EXERCISE OF CONGRESS'S POWERS TO ENFORCE THE FOURTEENTH AMENDMENT SO AS TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY FROM SUIT?

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BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Respondent believes that this case presents a question of Congress's power to enforce the Fourteenth Amendment only if it is determined that the States' power to impose a minimal charge for the issuance of a special parking placard for mobility disabled persons is prohibited by 28 C.F.R. § 35.130(f). In addition to the constitutional provisions, statutes and regulations cited by petitioners, other statutes and regulations

involved are as follows: N.C. GEN. STAT. §§ 20-37.5, -37.6, Public Law 100-641, and 23 C.F.R. § 1235. These statutes and regulations are set out in the Appendix hereto.

STATEMENT OF THE CASE

A.

Since 1972 North Carolina has maintained a system for providing parking spaces for persons with mobility impairments. N.C. GEN. STAT. ch. 20, art 2A (1998). (App. 1a.) Under current State law, upon presentation of a doctor's certification, any vehicle owner with either a permanent or temporary mobility impairment may obtain a license plate authorizing the vehicle to park in a space reserved for the handicapped. N.C. GEN. STAT. § 37.6(a) (1998). (App. 3a.) Additionally, any mobility impaired person may obtain as many as two placards designating a vehicle authorized to park in a reserved space. N.C. GEN. STAT. § 37.6(c) (1998). (App. 3a.) The cost of a placard is $5.00 and the placard is good for five years. *Id.* (App. 3a.) A vehicle bearing one of these familiar placards may park in any space reserved for such vehicles, regardless of whether the space is located on a government-owned parking lot, the public streets, or at a shopping center.

Article 2A was enacted by the General Assembly pursuant to the Uniform System for Handicapped Parking ("USHP") (25 C.F.R. 1235), which implements Pub. L. No. 100-641, 102 Stat. 3335 (Nov. 9, 1988). (App. 7a.) The purpose of the USHP

is "to provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk." 23 C.F.R. § 1235.1 (1991). (App. 11a.) These regulations provide that "[s]pecial license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk." 23 C.F.R. § 1235.6 (1996). (App. 13a.)

The State is not required by the Americans with Disabilities Act (ADA) of 1990, to issue either special license plates or placards. Implementing regulations to Title III of the ADA govern the dimensions of parking spaces, of parking access aisles for disabled persons, and the ratio of parking spaces available for employees and visitors. App. A to 28 C.F.R. Pt. 36, §§ 4.1.2. and 4.6. Neither these regulations nor any others issued pursuant to the ADA, however, purport to regulate who shall be entitled to park in spaces reserved for the mobility impaired. These matters are governed specifically by the USHP and State law. Virtually every State has enacted statutes implementing the USHP.

B.

Plaintiffs, five persons with mobility impairments, brought this class action in which they allege that the charge imposed

by the North Carolina Division of Motor Vehicles ("DMV") for the issuance of a removable windshield placard ("placard") for vehicles transporting persons with mobility impairments violates 42 U.S.C. § 12132 (providing that disabled persons shall not be denied "the benefit of the services, programs, or activities of a public entity" or subjected to discrimination by reason of such disability), and 28 C.F.R. § 35.130(f) ("§ 35.130(f)" or "the regulation"), an implementing regulation of the ADA. The regulation provides that

> [a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (1999)

The district court granted the DMV's motion to dismiss on the grounds that the action was barred by the Eleventh Amendment. The Court of Appeals for the Fourth Circuit affirmed, but on the narrower ground that § 35.130(f) exceeded Congress's Fourteenth Amendment enforcement powers, and therefore did not abrogate the States' Eleventh Amendment immunity. Plaintiffs' motion for rehearing and rehearing *en banc* was denied on May 11, 1999.

The majority opinion of the Fourth Circuit followed the analysis employed by this Court in *Seminole Tribe v. Florida*,

517 U.S. 44 (1996). *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 703 (1999) (*Pet. App.* A-7). At the outset, the court rejected the contention of the United States that courts should "look broadly at the entire statutory framework--here Title II of the ADA--and ratify its constitutionality without looking at the validity of its individual provisions or the agency regulations promulgated under its authority" to determine whether the States' immunity was validly abrogated. The court reasoned that such a "broad brush review" would require courts "to ratify unnecessarily the constitutionality of every provision in the title." *Id.* (*Pet. App.* A-9). The court also found that the need for administrability required review of individual provisions in the event that only parts of the title were found to be unconstitutional. *Id.* at 704 (*Pet. App.* A-10). Finally, the court concluded that "the crucial federalism concerns that animate the Eleventh Amendment," (*Pet. App.* A-10), necessitate review of the individual provisions lest the "important state interests in immunity" be left "under protected." *Id.* (*Pet. App.* A-11). The court also reasoned that considering only the constitutionality of the statute without reference to the constitutionality of the implementing regulation would permit the States to be sued pursuant to an unconstitutional agency regulation. *Id.* (*Pet. App.* A-11). Thus, the court concluded that "[r]easons of separation of powers, administrability, and federalism . . . dictate a searching review of the legal basis for suit. . . . [I]n determining whether it was acting pursuant to a valid exercise of power, we examine the legality of the specific statute and regulation whose asserted violation by state government gave

rise to the claim for relief in federal court." *Id.* at 705 (*Pet. App.* A-12).

The court then examined whether the State's immunity was effectively abrogated by the regulation. *Id.* (*Pet. App.* A-12). The court found that in enacting the ADA Congress clearly stated its intent to abrogate the States' sovereign immunity, *id.*, and that in so doing Congress "'invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment. . . . 42 U.S.C. §12101(b)(4).'" *Id.* (*Pet. App.* A-13). But Congress's Section 5 power was limited to remedying violations of rights protected by the Amendment; Congress has no power "to define the substance of those right." *Id.*, *citing City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (*Pet. App.* A-13).

The court recognized that "[u]nder *Boerne*, Section 5 enactments must target unconstitutional state action. The Constitution, however, has given state governments significant latitude in dealing with problems of disability."*Id.* at 706 (*Pet. App.* A-15). Relying on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the court held that the constitutionality of statutes affecting the disabled must be reviewed on a rational-basis test. *Id.* (*Pet. App.* A-16).

The Court explained why the sweep of § 35.130(f) unconstitutionally intruded upon the "basic ability [of state governments] to provide for their own citizens' health and welfare." *Id.* at 707 (*Pet. App.* A-17).

> Here Congress, through the Attorney General, acted to ban state surcharges designed to recover the costs of programs provided for the benefit of disabled persons. Such an act is only sustainable under the Section 5 power if many of those surcharges "have a significant likelihood of being unconstitutional." [*Bourne*, 117 S. Ct.] at 2170. In view of the efforts of states to assist the handicapped, including the admirable efforts of North Carolina which are at issue here, that likelihood is not apparent to this court. Nor has any party pointed us to any support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class. It may well be that some subset of those surcharges is in fact so motivated. But on the record before us, we can only believe that most fees are like that imposed by North Carolina law--a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities. Such a fee is rationally based and perfectly constitutional under *Cleburne*.

Id. (*Pet. App.* A-16-A-17).

The court proceeded to find that the regulation could not be justified as a prophylactic measure because it was disproportionate and incongruent to the "underlying unconstitutional state action" [though no such action has been identified]. *Id.* (*Pet. App.* A-16). Finally, the court concluded that the regulation created a "positive entitlement to a free handicapped parking space." *Id.* at 708 (*Pet. App.* A-18). As such it transforms the Equal Protection Clause from "a prohibition on invidious state action into a charter of positive

rights. Such a step, however, is beyond the scope of the Fourteenth Amendment." *Id.*

Judge Murnaghan, dissenting, disagreed with the majority's analysis. First, he could find nothing to indicate that "§ 35.130(f) is anything like the now discredited [Religious Freedom Restoration Act]." *Id.* (*Pet. App.* A-21). He then opined that the fact that the disabled were not a suspect class did not preclude Congress's legislating to protect a class of people that it found to be victims of invidious discrimination. *Id.* at 708-09 (*Pet. App.* A-21-A-22). The dissent reasoned that the regulation did not create an entitlement to a free parking space. Judge Murnaghan summarized his view as follows:

> It makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the cost of complying with Title IX of the Civil Rights Act of 1964.

Id. at 709-10 (*Pet. App.* A-18).

REASONS FOR DENYING THE WRIT

The Fourth Circuit correctly held that "28 C.F.R. § 35.130(f), which prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power. As such, it

is not a constitutionally valid exercise of power, and the effort to abrogate must fail." *Id.* at 705 (*Pet. App.* A-13).

The court's narrow focus on the regulation rather than on Title II as a whole properly takes into account the principle of federalism, which undergirds the structure of the Constitution, and avoids unnecessarily deciding constitutional questions which may reasonably be avoided. If this Court should issue its writ of certiorari in this case, it should do so to affirm the analytical approach and decision of the Fourth Circuit in this case.

I. BECAUSE THE DECISION OF THE COURT BELOW IS CORRECT, IT IS NOT NECESSARY FOR THIS COURT TO GRANT CERTIORARI TO REVIEW THE DECISION.

A. The Regulation Exceeds The Powers Of Congress To Enforce The Fourteenth Amendment.

Petitioners' argument begins with the false premise that the minimal fee charged by the State for the windshield placard is a charge for the cost of providing mobility impaired persons with non-discriminatory treatment. Petitioners urge this Court to issue its writ of certiorari, reverse the court below, and adopt the reasoning of Judge Murnaghan, who accepted petitioners' false premise and based his dissent upon it. This Court should not do so.

According to Judge Murnaghan in his dissent below, "[a]ll § 35.130(f) really stands for . . . is the unspectacular proposition that a state may not recover from victims of discrimination the cost of ending discrimination against those victims." 166 F.3d at 708. (*Pet. App.* A-21). Although this may describe the intent of the drafters of the regulation, the description is completely inaccurate when the regulation is applied to North Carolina's minimal charge for the placard.

First, the statement is wrong because the placard is not a measure to end discrimination. Rather, the purpose of the placard is to enhance the ability of persons with mobility impairments to more easily and fully partake of the benefits of society, not to end invidious discrimination. Past failures of architects and engineers to make buildings accessible to the handicapped were not acts of intentional discrimination against them. Nor was the failure to designate special parking places a discriminatory act or omission by building owners or managers against those with mobility impairments.[1] Moreover, the failure of private entities to make their facilities more accessible to those with mobility impairments cannot be imputed to the State. If, indeed, the ADA is read to define such conduct as discrimination prohibited by the Fourteenth Amendment, then

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[1] *But see* Judge Murnaghan's concurring opinion in *Amos v. Maryland Department of Correction*, 178 F.3d 212, 224 (4th Cir. 1999) ("A state's decision to construct facilities and design programs as if the disabled are not a part of society stems from attitudes formed during a 'lengthy and tragic history of segregation and discrimination,' *City of Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 303 (1978).").

Congress has attempted unlawfully to redefine the scope and meaning of the amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding unconstitutional the Religious Freedom Restoration Act as in excess of Congress's power to enforce the Fourteenth Amendment and a violation of the separation-of-powers doctrine).

Second, the above-quoted statement from the dissent in the case below is wrong because the measure is not an attempt to recover the cost of ending discrimination against those with mobility impairments. The dissent's comparison of the fee for the placards to the costs for complying with Title IX of the Civil Rights Act of 1964, 166 F.3d at 709-10 (*Pet. App.* A-23; A-24), is completely erroneous. The minimal fee is charged for a beneficial service voluntarily provided by the State, not one which the State is under a legal obligation to provide.

The dissent below further errs in saying that "[t]he regulation . . . merely ensures that the costs of correcting the wrongs inflicted upon the disabled will be borne by the wrongdoer (the state) rather than the victim (the disabled individual or group)." *Id.* at 709. (*Pet. App.* A-22). Most of the measures imposed by the ADA on private and public entities have nothing to do with ending discrimination, at least as that term is used in its constitutional sense. Rather, as noted above, the special placards and license plates increase the ability of disabled persons to enjoy the benefits of society to the same extent as persons without disabilities. There is no "wrongdoing" by anyone. Except in rare instances, there is no

discrimination at all. Thus, to call the State a "wrongdoer" is not only wrong, it is unfair.

Petitioners' other arguments for certiorari are equally invalid. It is simply not correct to say that the majority opinion "would permit states to undermine the ADA by imposing surcharges on individuals with disabilities whenever they use public services." (*Pet.* at 7.) Such a statement goes beyond hyperbole. This case did not involve an attempt by the State to charge the disabled for the cost of building an access ramp or installing a special elevator for them. The State has never contemplated, much less attempted, to charge for modifications to facilities to make them more accessible to the disabled.

Petitioners also engage in gross exaggeration in their paraphrase of Chief Justice Marshall's famous quote in *McCulloch v. Maryland*, 4 Wheat 316, 431 (1819). They assert that the State's "power to charge a fee on access is the power to destroy the right of access." (*Pet.* at 8.) Perhaps the simplest answer would be to paraphrase Justice Holmes's equally famous response in *Panhandle Oil Co. v. State of Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting): The power to charge a fee is not the power to destroy while the courts sit.[2]

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[2] Petitioners' citation of *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding the $1.50 Virginia poll tax unconstitutional) (*Pet.* at 8.) is completely inapposite. DMV does not argue that the charge for the placards is constitutional because it is minimal. The charge is constitutional because it is rationally related to the cost of providing a service. No one has suggested that the purpose or effect of the charge is to prevent poor disabled

Petitioners would have the Court treat the fee as if it were a legislative enactment affecting a suspect class. In *City of Cleburne*, 473 U.S. 432, this Court refused to treat the mentally retarded as a quasi-suspect class and thereby subject legislation affecting the retarded to heightened scrutiny. Consequently, State legislation affecting the disabled is reviewed only to determine whether the legislation is rationally related to a legitimate governmental purpose. *Id.* It is unquestionably rational for the State of North Carolina to charge a minimal fee to defray the cost of voluntarily providing a beneficial service to the handicapped. Under the aegis of Section 5, Congress has no power to outlaw a fee that is not invidiously discriminatory per se nor used to discriminate. *Cf. Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding Congressional ban on literacy tests, which in fact had been used to prevent African-Americans from voting).

Petitioners' arguments in support of certiorari will not withstand careful analysis. The charge is not an attempt by the State to recover the cost of a measure required to end discrimination against persons with mobility impairments. The fee is a modest, rationally based measure to defray the cost of the State's voluntarily providing a beneficial service to the disabled. The majority opinion below correctly held that the regulation is not congruent or proportional to any identifiable constitutional violation. Indeed, nothing in the Congressional findings indicates that the States have singled out the disabled

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people from parking. Nor does the charge impinge upon the exercise of a fundamental right like voting.

by charging them for the cost of remedial measures. The regulation's sweep, however, is so broad as to ban even State charges, such as the fee at issue in the instant case, that are neither discriminatory nor required to provide nondiscriminatory treatment. 166 F.3d at 707. The majority correctly decided the issue; therefore, the opinion of the court below should be left undisturbed by this Court.

B. The Panel Correctly Decided The Jurisdictional Issue On The Basis Of The Regulation On Which Plaintiffs' Claim Was Based Rather Than Considering The ADA As A Whole.

It is axiomatic that a case should be decided on the narrowest ground possible. *Ashwander v. T.V.A.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). It is a cornerstone of adjudication that a court should not decide constitutional questions unless to do so is not reasonably avoidable. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 104 (1944); *Ashwander*, 297 U.S. at 346-48. Petitioners fault the panel majority for their adherence to these established principles of judicial decision-making.

In enacting the ADA, Congress announced its intention "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day." 42 U.S.C. § 12101(b)(4)(1995). A review of the Congressional findings, 42 U.S.C. §12101, and individual provisions of the Act quickly shows that Congress was

concerned not only with ending intentional discrimination against the disabled, but also, and probably more so, with eliminating physical barriers that hindered full participation in society by the disabled. The Act was aimed at both the public and private sectors. Because of the broad scope of the Act, it is necessary to examine its provisions individually to determine whether they are founded on the Commerce Clause, the Fourteenth Amendment, or possibly some other constitutional provision. Obviously, measures that may be valid under one provision of the Constitution may not be sustainable under another.

In its answer and briefs, DMV contended that the ADA did not effectively override the States' immunity. The district court agreed and dismissed the action. However, the order of the district court was broader than necessary to determine the immediate question presented. Had the district court order stood, no private action could have been brought under the ADA against a State by a citizen in federal court. The Fourth Circuit's narrower approach appropriately avoided reaching this question. Because North Carolina had not waived its immunity or consented to federal jurisdiction, and the DMV acknowledged that Congress clearly intended to override the State's immunity, the court properly limited its inquiry to whether the regulation at issue was a valid measure under Section 5 of the Fourteenth Amendment. The court declined to employ a "broad-brush review" in order to avoid unnecessarily passing on whether Title II effectively abrogated the States' immunity. Likewise, the court refused to decide the constitutionality of an entire statute based on a challenge to one

provision of that statute. 166 F.3d at 703-04. Moreover, concerns of federalism and the States' Eleventh Amendment immunity militated against a broad-brush review. The court appropriately recognized that "[r]atifying an entire title and finding abrogation without examining the actual, specific legal basis for suit could subject a state to suit in federal court pursuant to an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme." *Id.* at 704. (*Pet. App.* A-11). Furthermore, to review the statute without reviewing the regulation "would lead to the abrogation of immunity in cases even where the agency rule was unconstitutional or beyond the bounds of delegated authority." *Id.* (*Pet. App.* A-11).[3]

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[3] Petitioners also argue that the Fourth Circuit misapplied *City of Boerne*, 521 U.S. 507. (*Pet.* at 10). The court did not err. Even given its broad Section 5 enforcement powers, Congress does not have the power to require the States to provide free of charge a service to the disabled, assuming the disabled were treated as a suspect class. If the regulation has the effect of requiring States to provide the service but prohibits them from charging for it, the regulation would violate *Boerne*'s proportionality and congruence test. Furthermore, such an interpretation of the regulation would also violate *New York v. United States*, 505 U.S. 144 (1992), by commandeering the States' legislative and administrative processes, and *Printz v. United States*, 521 U.S. 898 (1997), by commandeering the resources of the States.

II. THE CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN *DARE V. CALIFORNIA* DOES NOT REQUIRE THIS COURT TO GRANT CERTIORARI IN THE INSTANT CASE.

Petitioners have filed a supplemental brief in which they cite *Dare v. California*, 1999 WL 717724 (9th Cir. Sept. 16, 1999) (petition for rehearing and suggestion for rehearing *en banc* filed Sept. 30, 1999) (App. 15a), as creating a conflict between the circuits requiring this Court to grant certiorari. In *Dare*, the Ninth Circuit considered a challenge to California's charge for the parking placard. California's provision of special license plates and placards for persons with mobility disabilities was pursuant to the USHP and is quite similar to the program in North Carolina. The majority opinion found that the fee charged by California violated § 35.130(f).

The *Dare* majority first concluded that the placards were in fact measures required to provide persons who have mobility disabilities with nondiscriminatory treatment. (App. 24a.) The Ninth Circuit did not employ the Fourth Circuit's surgical approach of examining whether the regulation, as opposed to Title II, effectively abrogated the States' immunity. (App. 20a.) The court then found that UHSP was merely "hortatory" and had no effect on the court's analysis. (App. 23a) ("Even California concedes that in recognizing principles of federalism and state sovereignty, Congress rendered state compliance with Public Law 100-641 completely voluntary.")). The majority then found that the placards were required to provide nondiscriminatory treatment for the mobility disabled. The majority reasoned as follows:

> The ADA requires special parking arrangements such as handicapped parking spaces. These spaces allow disabled people equal access to public buildings in which California provides services, programs, and activities. Because California polices handicapped parking spaces, disabled people need placards or license plates to use them. California thus meets the ADA's requirement for nondiscriminatory access to public buildings by providing disabled people with placards and license plates.

Dare, 1999 WL 717724, at *4. (App. 24a.) By this faulty syllogism, the majority found the special license plates and placards mandated by the ADA, even though the multitude of explicit regulations promulgated to implement the Act have no such requirement. Having found that the ADA itself mandates the placard program, the majority concluded that the charge violates the ADA. (App. 25a.)The *Dare* majority then noted that it adhered to the Ninth Circuit's decision in *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997) (holding that the ADA validly abrogated the States' Eleventh Amendment immunity), *cert. denied*, 118 S. Ct. 2340 (1998) (App. 26a).[4]

Judge Fernandez dissented, however, on the ground that the fee did not violate the ADA.

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[4] Likewise, the Fourth Circuit held in *Amos*, 178 F.3d 212 that the ADA was a valid exercise of Congress's Section 5 enforcement powers. The *Amos* majority distinguished *Brown*, 178 F.3d at 221 n.8, but Judge Williams, dissenting, felt that the reasoning in *Brown* controlled the case. 178 F.3d at 225.

> Nothing in the law requires that California police usage of the spaces in order to assure that only disabled people are taking advantage of them. Indeed, if the federal government decided that usage must be policed by the states, that would come at least parlously close to an attempt to "commandeer state government" into enforcing a federal government policy at state cost. *See Printz*, 521 U.S. at ---, 117 S. Ct. at 2381.

Dare, 1999 WL 717724, at *10. (App. 39a.) Judge Fernandez also noted the USHP. He observed that the USHP provides that there should be no additional charge for special license plates but is silent as to placards. Such silence "suggests that Congress did not see anything particularly discriminatory in the exaction of a small fee for the issuance of placards, if any were issued at all." *Id.* at *11. (App. 40a.)

It is respectfully suggested that should the State of California submit a petition for writ of certiorari in this Court to review the *Dare* decision, that the writ should be issued in order to reverse the Ninth Circuit's holding in that case and hold instead that the charge for the placards does not violate § 35.130(f), as Judge Fernandez concluded. If this Court should find that the charge does violate the regulation, then the Court should hold, as did the Fourth Circuit, that the regulation exceeds the powers of Congress to enforce the Fourteenth Amendment.

CONCLUSION

Because the Fourth Circuit correctly held that the regulation exceeded the powers of Congress to enforce the Fourteenth Amendment, the States' Eleventh Amendment immunity was not abrogated by the regulation. It is, therefore, not necessary for this Court to issue its writ of certiorari to correct the holding of the court below. The question of whether Congress effectively overrode the State's Eleventh Amendment immunity is not necessarily before the Court. Only if the Court should find that the Fourth Circuit erred by the narrow scope of its opinion would it be necessary to decide the issue of whether the ADA validly abrogated the States' Eleventh Amendment immunity. That issue, however, is before the Court in *Florida Department of Corrections v. Wellington, No. 98-829, pet. for cert. filed, Nov.16, 1998,* and is also presented in *Alsbrook v.City of Maumelle*, No. 99-423, *pet. for cert. filed* Sept. 8, 1999.[5]

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[5] One of the questions presented in the petition for certiorari in *Maumelle* was the following:

> Whether the ADA was a proper exercise of the power granted to Congress by § 5 of the Fourteenth Amendment to the United States Constitution such that the immunity granted to the State of Arkansas by the Eleventh Amendment to the United States Constitution was abrogated.

Respectfully submitted.

MICHAEL F. EASLEY
North Carolina Attorney General

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October 20, 1999

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N.C. GEN. STAT. § 20-37.5

WEST'S NORTH CAROLINA STATUTES
CHAPTER 20. MOTOR VEHICLES
ARTICLE 2A. AFFLICTED, DISABLED OR HANDICAPPED PERSONS

Current through end of 1998 legislation

§ 20-37.5. Definitions

Unless the context requires otherwise, the following definitions apply throughout this Article to the defined words and phrases and their cognates:

(1) "Distinguishing license plate" means a license plate that displays the International Symbol of Access using the same color, size of plate, and size of letters or numbers as a regular plate.

(2) "Handicapped" shall mean a person with a mobility impairment who, as determined by a licensed physician:

a. Cannot walk 200 feet without stopping to rest;

b. Cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device;

c. Is restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume of one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than 60 mm/hg on room

air at rest;

d. Uses portable oxygen;

e. Has a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standards set by the American Heart Association;

f. Is severely limited in their ability to walk due to an arthritic, neurological, or orthopedic condition; or

g. Is totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential, as certified by a licensed ophthalmologist, optometrist, or the Division of Services for the Blind.

(3) "International Symbol of Access" means the symboladopted by Rehabilitation International in 1969 at its Eleventh World Congress on Rehabilitation of the Disabled.

(4) "Removable windshield placard" means a two-sided, hooked placard which includes on each side:

a. The International Symbol of Access, which is at least three inches in height, centered on the placard, and is white on a blue shield;

b. An identification number;

c. An expiration date; and

d. The seal or other identification of the issuing authority.

N.C. GEN. STAT. § 20-37.6

WEST'S NORTH CAROLINA STATUTES
CHAPTER 20. MOTOR VEHICLES
ARTICLE 2A. AFFLICTED, DISABLED OR HANDICAPPED PERSONS

Current through end of 1998 legislation

§ 20-37.6. Parking privileges for handicapped drivers and passengers

(a) General Parking.--Any vehicle that is driven by or is transporting a person who is handicapped and that displays a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard may be parked for unlimited periods in parking zones restricted as to the length of time parking is permitted. . . . Any qualifying vehicle may park in spaces designated as restricted to vehicles driven by or transporting the handicapped.

(b) Handicapped Car Owners; Distinguishing License Plates.--If the handicapped person is a registered owner of a vehicle, the owner may apply for and display a distinguishing license plate. This license plate shall be issued for the normal fee applicable to standard license plates. Any vehicle owner who qualifies for a distinguishing license plate may also receive one removable windshield placard.

(c) Handicapped Drivers and Passengers; Distinguishing

Placards.--A handicapped person may apply for the issuance of a removable windshield placard or a temporary removable windshield placard. Upon request, one additional placard may be issued to applicants who do not have a distinguishing license plate. . . . The Division shall establish procedures for the issuance of the placards and may charge a fee sufficient to pay the actual cost of issuance, but in no event less than five dollars ($5.00) per placard.

(c1) Application and Renewal; Physician's Certification.--The initial application for a distinguishing license plate, removable windshield placard, or temporary removable windshield placard shall be accompanied by a certification of a licensed physician, ophthalmologist, or optometrist or of the Division of Services for the Blind that the applicant is handicapped. The application for a temporary removable windshield placard shall contain additional certification to include the period of time the certifying authority determines the applicant will have the disability. Distinguishing license plates shall be renewed annually, but subsequent applications shall not require a medical certification that the applicant is handicapped. Removable windshield placards shall be renewed every five years, and the renewal shall require a medical recertification that the person is handicapped. Temporary removable windshield placards shall expire no later than six months after issuance.

(c2) Existing Placards; Expiration; Exchange for New Placards.--All existing placards shall expire on January 1, 1992. No person shall be convicted of parking in violation of

this Article by reason of an expired placard if the defendant produces in court, at the time of trial on the illegal parking charge, an expired placard and a renewed placard issued within 30 days of the expiration date of the expired placard and which would have been a defense to the charge had it been issued prior to the time of the alleged offense. Existing placards issued on or after July 1, 1989, may be exchanged without charge for the new placards.

(c3) It shall be unlawful to sell a distinguishing license plate, a removable windshield placard, or a temporary removable windshield placard issued pursuant to this section. A violation of this subsection shall be a Class 2 misdemeanor and may be punished pursuant to G.S. 20-176(c) and (c1).

. . . .

(f) Penalties for Violation.--

. . . .

(4) Notwithstanding any other provision of the General Statutes, the provisions of this section relative to handicapped parking shall be enforced by State, county, city and other municipal authorities in their respective jurisdictions whether on public or private property in the same manner as is used to enforce other parking laws and ordinances by said agencies.

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Portions of 102 Stat. 3335 (1988)

UNITED STATES PUBLIC LAWS
100th Congress - Second Session
Convening January 25, 1988

PL 100-641 (HR 3327)
November 9, 1988

. . . .

SEC. 3. "23 USC 402 note" HANDICAPPED PARKING SYSTEM.

(a) REGULATIONS. -- Not later than the 180th day following the date of the enactment of this Act, the Secretary of Transportation shall issue regulations --

(1) which establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals, and
(2) which encourage adoption of such system by all the States.

In issuing such regulations, the Secretary shall consult the States.

(b) DEFINITIONS. -- For purposes of this section --

(1) UNIFORM SYSTEM FOR HANDICAPPED

PARKING. -- A uniform system for handicapped parking designed to enhance the safety of handicapped individuals is a system which --

(A) adopts the International Symbol of Access (as adopted by Rehabilitation International in 1969 at its 11th World Congress on Rehabilitation of the Disabled) as the only recognized symbol for the identification of vehicles used for transporting individuals with handicaps which limit or impair the ability to walk;

(B) provides for the issuance of license plates displaying the International Symbol of Access for vehicles which will be used to transport individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(C) provides for the issuance of removable windshield placards (displaying the International Symbol of Access to individuals with handicaps which limit or impair the ability to walk, under criteria determined by the State;

(D) provides that fees charged for the licensing or registration of a vehicle used to transport individuals with handicaps do not exceed fees charged

for the licensing or registration of other similar vehicles operated in the State; and

(E) for purposes of easy access parking, recognizes licenses and placards displaying the International Symbol of Access which have been issued by other States and countries.

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23 C.F.R. §§ 1235.1, 1235.2, 1235.3, 1235.4, 1235.5, 1235.6, 1235.8 (1991)

§ 1235.1 Purpose.

The purpose of this part is to provide guidelines to States for the establishment of a uniform system for handicapped parking for persons with disabilities to enhance access and the safety of persons with disabilities which limit or impair the ability to walk.

§ 1235.2 Definitions.

Terms used in this part are defined as follows:

(a) *International Symbol of Access* means the symbol adopted by Rehabilitation International in 1969 at its Eleventh World Congress on Rehabilitation of the Disabled.

(b) *Persons with disabilities which limit or impair the ability to walk* means persons who, as determined by a licensed physician:

(1) Cannot walk two hundred feet without stopping to rest; or

(2) Cannot walk without the use of, or assistance from, a brace, cane, crutch, another person, prosthetic device, wheelchair, or other assistive device; or

(3) Are restricted by lung disease to such an extent that the person's forced (respiratory) expiratory volume for one second, when measured by spirometry, is less than one liter, or the arterial oxygen tension is less than sixty mm/hg on room

air at rest; or

(4) Use portable oxygen; or

(5) Have a cardiac condition to the extent that the person's functional limitations are classified in severity as Class III or Class IV according to standard set by the American Heart Association; or

(6) Are severely limited in their ability to walk due to an arthritic, neurological, or orthopedic condition.

§ 1235.3 Special license plates.

(a) Upon application of a person with a disability which limits or impairs the ability to walk, each State shall issue special license plates for the vehicle which is registered in the applicant's name. The initial application shall be accompanied by the certification of a licensed physician that the applicant meets the § 1235.2(b) definition of persons with disabilities which limit or impair the ability to walk. The issuance of a special license plate shall not preclude the issuance of a removable windshield placard.

§ 1235.4 Removable windshield placards.

(a) The State system shall provide for the issuance and periodic renewal of a removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require that the issuing authority shall, upon request, issue one additional placard to applicants who do not have special

license plates.

§ 1235.5 Temporary removable windshield placards.

(a) The State system shall provide for the issuance of a temporary removable windshield placard, upon the application of a person with a disability which limits or impairs the ability to walk. The State system shall require that the issuing authority issue, upon request, one additional temporary removable windshield placard to applicants.

§ 1235.6 Parking.

Special license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

§ 1235.8 Reciprocity.

The State system shall recognize removable windshield placards, temporary removable windshield placards and special license plates which have been issued by issuing authorities of other States and countries, for the purpose of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

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Dare v. California, 1999 WL 717724 (9th Cir.(Cal.))

William Robert DARE; Gary Petillo, Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; Dept. Of Motor Vehicles, Defendants-Appellants.

No. 97-56065.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 15, 1999

Filed Sept. 16, 1999

Angela Sierra, Deputy Attorney General, San Diego, California, for the defendant-appellant.

Andrew R. Hall, Elizabeth Staggs-Wilson, Davis, Wright & Tremaine, Los Angeles, California, for the plaintiffs-appellees.

Appeal from the United States District Court for the Central District of California. J. Spencer Letts, District Judge, Presiding, D.C. No. CV-96-05569- JSL-ANx.

Before: Dorothy W. Nelson, Ferdinand F. Fernandez, and William A. Fletcher, Circuit Judges.

D.W. NELSON, Circuit Judge:

This case involves a challenge under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, et seq. (West Supp.1999) ("ADA"), and its regulations to California's $6 biennial fee for disability parking placards. The State of California, Department of Motor Vehicles [hereinafter "California"], appeals the district court's grant of partial summary judgment in favor of William Robert Dare, Gray Petillo, and the class of plaintiffs they represent. California claims that the fee does not violate the ADA and that a blanket prohibition on such nominal fees is unconstitutional. We disagree and affirm the district court.

Facts and Procedural History

California has a comprehensive priority parking program for qualifying disabled individuals and veterans. *See* Cal. Veh.Code. §§ 295.5, 295.7 (West 1999). California provides these individuals with extensive priority parking and exemptions from all parking meter fees and most parking time restrictions. *See id.* §§ 22511.5, 22511.7, 22511.8. To prevent abuse, California limits access to these privileges to vehicles displaying state- issued disability license plates or parking placards. *See id.* §§ 22507.8, 22511.5. California imposes significant fines upon illegal use of disability parking spaces and authorizes local entities to establish enforcement units. *See id.* §§ 4461, 4463(d), 22507.9, 22511.8, 22511.56, 22511.58, 42001.5.

Registered vehicle owners who are disabled themselves or who use their vehicles to transport disabled individuals at least 51% of the time can obtain disability license plates. California charges the standard license plate fees for these special plates. *See id.* §§ 5007(a), 9250. In lieu of or in addition to a disability license plate, California issues disability parking placards to disabled individuals for a $6 fee. *See id.* § 22511.55. Individuals may use these portable placards in multiple vehicles. The placards expire if not renewed every two years, and California charges fees for renewal or replacement. *See id.* § 22511.55(a)(3) & (c)(2). The placard fees partly defray the cost of the disability parking program.

On August 13, 1996, Dare and Petillo, two disabled individuals, filed a class action lawsuit challenging California's $6 placard fee as a violation of ADA Title II and its promulgating regulations. Dare and Petillo allege that the fee constitutes an impermissible surcharge upon measures necessary to provide the nondiscriminatory treatment of individuals and groups required by the ADA. They rely on 42 U.S.C. § 12132, which states that "[s]ubject to the provisions of this subchapter, no qualified individual shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. To prove the ADA's particular prohibition of surcharges on parking permits, Dare and Petillo cite 28 C.F.R. § 35.130(f), promulgated by the Department of Justice in implementing the ADA, which states that

> [a] public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (1998).

The district court granted partial summary judgment with respect to the class of people qualifying as disabled under the ADA,[1] found the fee to be an impermissible surcharge, and ordered a permanent injunction against California's imposition of the fee. California timely appeals.

Jurisdiction

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (West Supp.1999) to review the district court's interlocutory order granting a permanent injunction. Because the district court's partial summary judgment order provides legal authority for the injunction and is thus inextricably bound with it, we also have jurisdiction to review that order. See Paige v. State of California, 102 F.3d 1035, 1040 (9th Cir.1996).

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[1] Specifically, this plaintiff class included all purchasers of California placards since January 26, 1992 and future purchasers who are disabled under the ADA.

Standard of Review

We review for abuse of discretion the district court's grant of a motion for a permanent injunction, *see Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059, 1062 (9th Cir.1991), but review any determination underlying the grant of the motion by the standard that applies to that determination, *see Multnomah Legal Servs. Workers Union v. Multnomah County Legal Aid Serv.*, 936 F.2d 1547, 1552 (9th Cir.1991). We review de novo a district court's grant of a motion for partial summary judgment. *See Thompson v. Holy Family Hosp.*, 121 F.3d 537, 539 (9th Cir.1997).

Discussion

This case raises two main issues: (1) Does California's $6 placard fee violate Title II of the ADA and its implementing regulations, and, if so, (2) was Congress's enactment of Title II of the ADA a valid exercise of its power under § 5 of the Fourteenth Amendment to abrogate California's Eleventh Amendment immunity from suit? Because we answer both of these questions in the affirmative, we affirm the district court's grant of partial summary judgment and a permanent injunction against imposition of the placard fee.

I. Violation of ADA Title II

Analyzing whether California's $6 placard fee violates the ADA requires three inquiries. First, what obligations does Title II impose upon states regarding fees for measures under the

ADA? Second, does Public Law 100-641, 23 U.S.C. § 402 (West Supp.1999), which contemplates a fee for disabled parking placards as part of a uniform system for disabled parking, limit states' Title II obligations? Third, are these obligations violated by California's $6 fee for parking placards? As explained below, we conclude that the $6 fee constitutes a surcharge for required measures in violation of the ADA and its implementing regulations.

A. Obligation under Title II

In order to evaluate whether a fee constitutes a surcharge that violates Title II of the ADA, we conduct a two-part inquiry. First, as a threshold matter, we consider whether the measure for which California levies the fee is "required to provide that individual or group nondiscriminatory treatment" as mandated by the ADA. 28 C.F.R. § 35.130(f). If California charges for a measure not required under the ADA, the inquiry ends; 28 C.F.R. § 35.130(f) only forbids surcharges for "required" measures.

Second, we evaluate whether the fee for the measure is a surcharge; in other words, we consider whether it constitutes a charge that nondisabled people would not incur. If nondisabled people pay the same fee for an equivalent service, the charge to disabled people would not constitute a surcharge on a "required" measure. Thus, for example, a state can charge a fee for disabled license plates so long as it charges the same fee for nondisabled license plates.

Because surcharges against disabled people constitute facial discrimination, the meaningful access test formulated by the Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), does not apply. Under this test, a court considers whether the allegedly discriminatory measure prevents "meaningful access to the benefit that the grantee offers." *Id.* at 301. The Ninth Circuit has applied this test in the ADA context to evaluating whether facially neutral laws violate § 12132. *See Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1042-43 (9th Cir.1998); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir.1996).

Using this standard in the context of facially discriminatory laws, however, would ignore the clear language of Title II. *Cf. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 733-35 (9th Cir.1999) (holding that the reasonable modifications test does not apply to facially discriminatory laws because they present per se § 12132 violations). § 12132 covers not only "exclusion from participation in or [denial of] benefits of the services, programs, or activities of a public entity," but also being "subjected to discrimination by any such entity." 42 U.S.C. § 12132. By reviewing all § 12132 claims under a meaningful access test, this Circuit would focus only on exclusions and denials, and ignore completely the discrimination clause, not to mention the explicit language of the ADA regulation at issue here. Other courts evaluating fees similar to the one at issue here have read the statute and ADA regulation together rather than applying a meaningful access test. *See Thompson v. Colorado*, 29 F. Supp. 2d 1226, 1231 (D.Colo.1998); *Thrope v. State of Ohio*, 19 F.

Supp. 2d 816, 824 (S.D.Ohio 1998); *McGarry v. Director, Dept. of Revenue*, 7 F. Supp.2d 1022, 1028 (W.D.Mo.1998). We thus follow their approach and do the same; we hold that when states apply charges to required measures, we consider whether these fees constitute a surcharge forbidden under the ADA.

B. Effect of Public Law 100-641

The government urges us to view Public Law 100-641 and the regulations promulgated pursuant to it as justifying the placards surcharge. On November 9, 1988, prior to the passage of the ADA, Congress enacted Public Law 100-641, 23 U.S.C. § 402. This law indicates that the Secretary of Transportation shall issue regulations which: (1) establish a uniform system for handicapped parking designed to enhance the safety of handicapped individuals and (2) encourage adoption of such system by all the states. See id.

Pursuant to Public Law 100-641, the Department of Transportation (DOT) promulgated regulations in March 1991, eight months after Congress enacted the ADA. The DOT regulations provide in pertinent part that:

> Special license plates, removable windshield placards, or temporary removable windshield placards displaying the International Symbol of Access shall be the only recognized means of identifying vehicles permitted to utilize parking spaces reserved for persons with disabilities which limit or impair the ability to walk.

23 C.F.R. § 1235.6 (1998). DOT regulations further provide that each state shall issue special license plates upon the application of a person with a disability that impairs the ability to walk and that "[t]he fee for the issuance of a special license plate shall not exceed the fee charged for a similar license plate for the same class vehicle." Id. § 1235.3. In contrast to the provisions concerning license plate fees, neither Public Law 100-641 nor the regulations prohibit the imposition of placard fees.

The government's argument fails, however, because Public Law 100-641 is purely hortatory. See McGarry, 7 F.Supp.2d at 1026. Congress enacted Public Law 100-641 two years before the ADA and has no enforcement mechanism. Even California concedes that in recognizing principles of federalism and state sovereignty, Congress rendered state compliance with Public Law 100-641 completely voluntary.

In contrast, the ADA expressly applies to the states through Congress's Fourteenth Amendment powers, as discussed in more detail in Part II. Regulations promulgated pursuant to the ADA bind states so long as the regulations are not arbitrary, capricious, or contrary to the ADA. See Does 1-5 v. Chandler, 83 F.3d 1150, 1153 (9th Cir.1996). As discussed below, 28 C.F.R. § 35.130(f) meets that standard. We thus evaluate California's surcharge based on the requirements of Title II and 28 C.F.R. § 35.130(f). Public Law 100-641 does not impact our analysis.

C. Application to the California Fees

Applying this approach to the California fee at issue, we find the fee to be a surcharge for a required measure in violation of the ADA. The ADA requires special parking arrangements such as handicapped parking spaces. These spaces allow disabled people equal access to public buildings in which California provides services, programs, and activities. Because California polices handicapped parking spaces, disabled people need placards or license plates to use them. California thus meets the ADA's requirement for nondiscriminatory access to public buildings by providing disabled people with placards and license plates.

Furthermore, California's provision of license plates alone would not be sufficient to give individuals nondiscriminatory access to public places. In addition to the fact that many disabled people may not own cars or have someone who drives them 51% of the time, even those who do may sometimes have to use other vehicles as passengers or as drivers. They may rent cars or wish to drive with another person. To require disabled people to use only a designated car for which they have a license plate restricts them far more in accessing public places than people who lack their disabilities. This reasoning comports with cases by other courts that have struck down fees like the one in California. *See Thompson*, 29 F. Supp. 2d at 1231-32; *Thrope*, 19 F. Supp. 2d at 825; *McGarry*, 7 F. Supp. 2d at 1028.

Because providing the placards is a required measure under California's current program of providing access to

handicapped parking spaces, we turn to the question of whether charging the fee for them constitutes a forbidden surcharge. This issue hinges on whether California provides the same fee for an equivalent service for nondisabled people. In support of such equivalence, the appellees argue that the placard fee is comparable to, and probably less than, charges nondisabled people accrue at parking meters. California thus claims that if the $6 fee is viewed as a partial payment of waived meter fees, then disabled people are not being charged more than other people.

California's argument fails, however, because many public places do not have parking meters and people who lack disabilities face no fees in parking at those places. Such a distinction is unacceptable. Charging disabled people for parking that would otherwise be free constitutes discrimination in the provision of access to public buildings, a measure required under the ADA. We thus affirm the district court on this issue and hold that California's fee for handicapped parking placards violates the ADA.

II. Constitutionality

Having established an ADA violation, we turn to the constitutional issues raised by the government. This Circuit has held that in enacting Title II of the ADA, Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers. *See Clark v. California*, 123 F.3d 1267, 1270- 71 (9th Cir.1997). The majority of Circuits addressing

this issue have followed this Circuit's approach in *Clark*.[2]

We continue to adhere to our holding in *Clark* today. In light of the Supreme Court's recent decision in *Florida Prepaid Postsecondary Educational Expense Board v. College Savings Bank*, --- U.S. ----, 119 S.Ct. 2199, --- L.Ed.2d---- (1999) [hereinafter Florida Prepaid], and the circuit split on this issue, however, we provide further discussion of Title II of the ADA

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[2] *Compare Martin v. Kansas*, 1999 WL 635916, at *3-*6 (10th Cir. Aug.19, 1999), *Muller v. Costello*, Nos. 98-7491, 98-7729, 1999 WL 599285 (2d Cir. Aug.11, 1999) (page references not available) (holding that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers), *Amos v. Maryland Dept. of Pub. Safety and Correctional Servs.*, 178 F.3d 212, 216-23 (4th Cir.1999) (same), *Kimel v. State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir.1998) (same), *Coolbaugh v. Louisiana*, 136 F.3d 430, 432-38 (5th Cir.1998) (same), cert. denied, --- U.S. ----, 119 S.Ct. 58, 142 L.Ed.2d 45 (1998), and *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 487 (7th Cir.1997), with *Alsbrook v. City of Maumelle*, No. 97-1825, 1999 WL 521709, at *4-*7 (8th Cir. July 23, 1999) (en banc) (holding that Title II of the ADA was not a valid exercise of Congress's § 5 powers), and *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 702-10 (4th Cir.1999) (holding that forbidding surcharges under the ADA exceeds Congress' Fourteenth Amendment powers). *See generally Torres v. Puerto Rican Tourism Co.*, 175 F. 3d 1, 4-5 (1st Cir.1999) (failing to reach the issue, in part, because of the dominant precedent upholding Congress' exercise of its Fourteenth Amendment powers in enacting the ADA); *Nelson v. Miller*, 170 F.3d 641, 648 & n. 7 (6th Cir.1998) (declining to reach this issue, but summarizing the state of the law). We note that the Fourth Circuit has ruled both that the ADA constitutes a proper exercise of Congress's § 5 powers, *see Amos*, 178 F.3d at 221-222 & n. 8, and that the regulation forbidding surcharges exceeds Congress's § 5 authority, *see Brown*, 166 F.3d at 702-10. Because we hold that regulations do not receive an independent constitutional assessment, see infra Subsection II.A.2, the Fourth Circuit authority is thus more in accord with than opposing our Fourteenth Amendment analysis.

as an appropriate Congressional exercise of its § 5 powers that thus accords with both the Tenth and Eleventh Amendments.

A. Eleventh Amendment

1. Title II of the ADA

When Congress both expresses unequivocal intent to abrogate immunity and also acts pursuant to its § 5 powers, a state's immunity is waived. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Clark*, 123 F.3d at 1269. As noted in *Clark*, "Congress has unequivocally expressed its intent to abrogate the State's immunity under ... the ADA," 123 F.2d at 1269. The focus of our discussion is therefore on why Title II constitutes a valid exercise of Congress's powers under § 5 of the Fourteenth Amendment.

The Court's recent decision in Florida Prepaid clarifies the congruence and proportionality test outlined in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The first step of this test involves identification of the "Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy," using historical experience as a reference point. *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2207 (*quoting City of Boerne*, 521 U.S. at 525). The second step requires consideration of whether the provisions of the statute are proportional to their remedial or preventive goal. See id. at 2210 (*quoting City of Boerne*, 521 U.S. at 532).

Before applying this test to Title II of the ADA, we note that Congress's enforcement authority is at its apex when fashioning remedies aimed at the core Fourteenth Amendment guarantee of Equal Protection. *City of Boerne* and *Florida Prepaid* both emphasized Congress's power in dealing with discrimination, such as in the voting rights context. *See Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2207; *City of Boerne*, 521 U.S. at 525-27. The Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative sphere of autonomy previously reserved to the States." *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2206 (quotation omitted); *City of Boerne*, 521 U.S. at 518 (internal quotation omitted).

a. Congruence

Although disabled people do not constitute a suspect class, the Equal Protection Clause prohibits irrational and invidious discrimination against them. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). When it enacted the ADA, Congress made specific factual findings of arbitrary and invidious discrimination against the disabled. *See id.* § 12101(a)(7). On the basis of these findings, Congress concluded that the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with

disabilities. *See* 42 U.S.C. § 12101(b).[3] We thus hold that the ADA in general and Title II in particular satisfy the congruence requirement.

b. Proportionality

Having established the ADA's congruence with Congress's power to enforce the Equal Protection Clause, we turn to proportionality. In so doing, we reiterate the importance of deference to Congress in this analysis.[4] The Supreme Court has specifically found protections for people with disabilities to be an area in which Congressional judgment should be given great deference. *See Cleburne Living Center*, 473 U.S. at 442-43. [5]

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[3] A number of cases have held that the ADA constitutes a proper exercise of Congress' Fourteenth Amendment powers with specific reference to Congress's factual findings. *See Muller*, 1999 WL 599285, at ----, *Amos*, 178 F.3d at 218-19, *Kimel*, 139 F.3d at 1433, *Coolbaugh*, 136 F.3d at 435-38, *Crawford*, 115 F.3d at 486-87; *cf.* Timothy Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L.Rev. 393, 393-94 & nn. 1-4 (1991) (discussing Congress's extensive fact-finding and the history of state-sponsored irrational discrimination and animus against disabled people).

[4] As stated above, the Supreme Court has explicitly indicated that Congress's enforcement power to deter or remedy constitutional violations allows it to prohibit some constitutionally acceptable conduct, even in traditional areas of state autonomy, as part of its larger enforcement effort. *See City of Boerne*, 521 U.S. at 518 (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)); *accord Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2206 (*quoting City of Boerne*, 521 U.S. at 518).

[5] Discussing in Cleburne Living Center the legal protections to which individuals with developmental disabilities are entitled, the Court

The ADA is thus an appropriate exercise of § 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination.[6]

As noted above, Congress made extensive factual findings regarding the widespread arbitrary and invidious discrimination which disabled people face. *See* 42 U.S.C. § 12101(a). The ADA's particular provisions for each sector then indicate specifically the discrimination which is forbidden and the conduct needed to remedy the discrimination. *See* 42 U.S.C. § 12101 *et seq*. Although Title II's provisions may prohibit some State conduct which would pass muster under rational basis review, the Title's focus is on eliminating the discrimination outlined in the factual findings.

We thus agree with the Second Circuit and hold that "[i]n

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noted that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." *Id.* The Court recently reinforced this approach in *Olmstead v. Zimring*, --- U.S. ----, 119 S.Ct. 2176, --- L.Ed.2d ---- (1999). Although declining to reach constitutional questions, *see id.* at 2181, the Court held that "unjustified isolation ... is properly regarded as discrimination based on disability," *id.* at 2185, and spoke approvingly of the ADA's efforts to end that isolation, *see id.* at 2187.

[6] We therefore disagree with the Eighth Circuit that the ADA's legislative record must "support the proposition that most state programs and services discriminate arbitrarily against the disabled" for abrogration of immunity to be appropriate.

light of Congress's findings of the extent of discrimination against people with disabilities and with due regard to the deference owed to Congress in making such judgments, we will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities." *Muller*, 1999 WL 599285, at ----. Congress's findings were sufficiently extensive and related to the ADA's provisions that the provisions can "be understood as responsive to or designed to prevent, unconstitutional behavior." *Florida Prepaid*, --- U.S. at ----, 119 S.Ct. at 2210 (*quoting City of Boerne*, 521 U.S. at 532). Therefore, we hold that the ADA was a congruent and proportional exercise of Congress's enforcement powers under § 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity.

2. Acceptability of 28 C.F.R. § 35.130(f)

Although California acknowledges the constitutionality of Title II of the ADA, it claims that the prohibition in 28 C.F.R. § 35.130(f) against states charging even de minimis administrative fees violates the Fourteenth Amendment. We disagree.

The primary flaw in the government's approach is that it conducts its Fourteenth Amendment analysis in a piecemeal manner. Because the statutory scheme as a whole constitutes a proper exercise of Congress' power to legislate under § 5, *see Clark*, 123 F.3d at 1270-71, regulations promulgated pursuant to the ADA "must be given 'legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary

to the statute.' " *Does 1-5*, 83 F.3d at 1153 (*quoting United States v. Morton*, 467 U.S. 822, 834, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984)).[7]

Here, the regulation is not arbitrary, capricious, or contrary to the ADA. *See id.* Title II protects the rights of disabled people to have the same public services, programs, and activities as those who are not disabled. *See* 42 U.S.C. § 12132. If public entities place a surcharge on measures that help disabled people achieve this parity, disabled people then are

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[7] As the Supreme Court stated in Olmstead:

> [b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance.' "

--- U.S. ----, 119 S.Ct. at 2186, --- L.Ed.2d---- (*quoting Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (internalquotation and citation omitted)).
In taking this approach, we reject the reasoning of the Fourth Circuit in *Brown*, which determined that "separation of powers, administrability, and federalism" required an examination of "the legality of the specific statute and regulation whose asserted violation by the state government gave rise to the claim for relief in federal court." Brown, 166 F.3d at 705. In our view, a piecemeal analysis of the regulations would unduly constrain Congress's power to construct a statutory scheme addressing discrimination; the federal courts, in effect, would have a line-item veto over legislation directed at intentional or arbitrary discrimination by the states.

paying fees others do not and so are not being treated equally.

Forbidding such additional charges is a solution aimed at preventing this type of discrimination; it addresses the improper approach to funding services for the disabled, see 28 C.F.R. § 35.130(f), while leaving states broad flexibility to administer and fund their programs otherwise, *cf. Duprey v. State of Conn., Dept. of Motor Vehicles*, 28 F.Supp.2d 702, 708 (D.Conn.1998) ("If the DMV wants to pass on the costs of providing placards, rather than absorbing the costs itself, it must pass the cost on to all parkers, and not just those disabled individuals protected by the ADA."). The rationale for this regulation thus dovetails neatly with the purposes of Title II. We therefore hold that 28 C.F.R. § 35.130(f) has controlling weight.

B. Tenth Amendment

Because Title II falls within Congress's Fourteenth Amendment powers, it does not conflict with powers reserved to the states under the Tenth Amendment. *See Ex parte Virginia*, 100 U.S. 339, 344-47, 25 L.Ed. 676 (1879); *see also Armstrong*, 124 F.3d at 1024-25. We thus hold that the ADA does not violate the Tenth Amendment.

Conclusion

The California placard fee violates the ADA and its implementing regulations. Because the ADA constitutes an appropriate exercise of Congress's enforcement powers under

§ 5 of the Fourteenth Amendment, California's Tenth and Eleventh Amendment challenges fail. Furthermore, we accord 28 C.F.R. § 35.130(f) controlling weight as an regulation promulgated pursuant to the ADA that is not arbitrary, capricious, or contrary to the statute. We therefore AFFIRM the district court's grant of summary judgment in favor of appellees and of a permanent injunction against imposition of the surcharge.

AFFIRMED.

FERNANDEZ, Circuit Judge dissenting:

Because I cannot agree that the small fee California charges for placards violates the ADA, I dissent.

California has sought to ameliorate the parking problems that those with disabilities can face when they use automobiles to attend to business, recreation or any of the other pursuits of daily life. To that end, special parking places are set aside and marked for the sole use of disabled people. *See, e.g.,* Cal. Veh.Code §§ 22511.7, 22511.8. In addition, unlimited parking is available in zones in which others may only park for a limited time, and disabled people need not pay parking meter fees. *See* Cal. Veh.Code § 22511.5. It is one thing, however, to set aside spaces and confer other benefits, but quite another to assume that only disabled people will take advantage of those opportunities. Others may well succumb to the temptation to park in the special spaces, which are generally more convenient to the place one is going and which may well be open when all other desirable spaces are filled. Therefore, California not only has made the spaces available, but also has created a method that helps to assure that the spaces, and other benefits, will remain available for disabled people only.

Under California law, a disabled person who owns a motor vehicle can obtain a license plate, which contains a special symbol--the International Symbol of Access, "commonly known as the wheelchair symbol." Cal. Veh.Code § 5007. As interpreted by the DMV, the license plate is also available to any person who is not disabled, if the vehicle is used to

transport a disabled person at least fifty-one percent of the time. There is no charge for the license plate beyond that which is paid by every other person who registers an automobile with the DMV.

California, however, also decided to add more flexibility to the program. It recognized that many disabled persons may be driven by others, who do not do so fifty-one percent of the time, and that it would be beneficial if the other person's automobile could also be parked in the special parking spaces when a disabled person was transported. Therefore, California provided for the issuance of special placards, which are portable and can be used in any automobile that is being driven or utilized by a disabled person. *See* Cal. Veh.Code § 22511.55; *see also* Cal. Veh.Code § 22511.56 (misuse of placards). While license plates are issued to every automobile, the special placard is a unique item which is issued to disabled persons only. It, therefore, imposes special costs upon DMV. In order to defray a portion of those added costs, California has imposed a small fee upon those who apply for the placard. That fee is, basically, six dollars every two years. *See* Cal. Veh.Code §§ 22511.55(a)(2), 22511.55(a)(3). That does not pay for the full cost of issuing placards, and in a typical two-year cycle, 1995-1996, DMV's costs exceeded the fee revenues by $1,182,829. That fee is the subject of this litigation. This case deals with a sensitive area which lies at the border of federal and state relationships. Ours is a system of dual sovereignty, and some care must be taken when Congress wishes to have the states carry out congressional policies. The states are not mere adjuncts of the federal government. *See, e.g., Printz v. United*

States, 521 U.S. 898, ----, 117 S.Ct. 2365, 2376-77, 138 L.Ed.2d 914 (1997). That broods over this case as we undertake the task of deciding whether California violated the ADA when it enacted a placard fee, which amounts to twenty-five cents per month. Dare argues that it did. If so, and if Congress could constitutionally prohibit that, the district court's decision must be upheld. California attacks both parts of that conjunctive sentence. Because I agree that the ADA was not violated, I see no need to consider the more thorny constitutional portion of the sentence. But that is getting slightly ahead of the story, for I should start with the ADA itself.

That statute, as relevant here, provides that "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. On its face, it would not seem that the fee in question here can be said to, somehow, deny disabled people the benefit of any services offered to the public by California, or that it can be said to discriminate against them. But, of course, the bare words of the statute are not the only law in this area.

The United States Department of Justice is responsible for interpreting and implementing that provision of the ADA. *See* 42 U.S.C. § 12134. It has issued various regulations and guidelines. In explaining its understanding of the requirements of the ADA, the DOJ has stated that "a public entity should provide an adequate number of accessible parking spaces in

existing parking lots or garages over which it has jurisdiction." 28 C.F.R. Pt. 35 App. A at 457. There is no dispute that California has provided special parking places for disabled persons with vehicles.

The dispute in this case is over whether California has violated a DOJ regulation, which provides that:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f); *see also* Americans with Disabilities Act, DOJ Technical Assistance Manual (Title II), Section II--3.5400. I would hold that California has not violated that provision.

Certainly, California has not, in as many words, excluded disabled persons from any program generally offered to the public. If a failure to make special parking places available could be said to exclude them from the use of some other program, California has not failed to provide for the spaces themselves. No doubt the spaces are available in the sense that they have been set aside. California, however, has sought to assure that those who are not disabled will not use the spaces. No doubt, its method of doing so can inhibit use by a disabled person because the only rational way to provide the extra

assurance is to police usage by placing some sort of special symbol on the parked automobile. Even that is not a perfect solution, of course, because people could use counterfeit permits or otherwise abuse the program. *See* Cal. Veh.Code §§ 4463, 22511.56. Nevertheless, that it does help cannot be doubted.

Under the ADA, as it relates to the issues before us, the most that California is required to do is make accessible parking places available at public facilities. *See* 28 C.F.R. § 36.304(a)(18). That, of course, does not, itself, even require special designation or signing. In fact, one could conceive of a situation where all spaces in a parking area were quite accessible. At any rate, there is no claim that California has not made spaces available. In fact, it has gone far beyond that and has provided for overtime parking in zones limited for everyone else and for free metered parking. *See* Cal. Veh.Code § 22511.5.

Nothing in the law requires that California police usage of the spaces in order to assure that only disabled people are taking advantage of them. Indeed, if the federal government decided that usage must be policed by the states, that would come at least parlously close to an attempt to "commandeer state government" into enforcing a federal government policy at state cost. *See Printz*, 521 U.S. at ----, 117 S.Ct. at 2381. No doubt the provision of spaces has many costs, not the least of which is the expense of setting aside and signing special spaces, perhaps larger than normal, which may go unutilized a good part of the time, and which surely have less usage than

other parking spaces. I, of course, need not address those costs. California has willingly accepted them.

California has also accepted the cost, if any, of issuing special license plates for disabled persons who have their own vehicles, which need to be parked, as well as for those who transport disabled people most of the time. *See, e.g.*, Cal. Veh.Code § 5007. I need not decide whether California could impose a charge for that enhancement of the parking program because, again, California has not sought to do so. In that regard, however, it is interesting to note that Congress passed a statute designed to "encourage" states to adopt a uniform system for handicapped parking. *See* Act of Nov. 9, 1988, Pub.L. No. 100-641, 102 Stat. 3335 § 3 (1988) (Handicapped Parking System Provision (HPS)). It did so before the enactment of the ADA, but at a time when the Rehabilitation Act of 1973 was in effect. See 29 U.S.C. § 701-796l. At that point, Congress indicated that a uniform policy should provide for special license plates for which there should be no charge. *See* HPS § 3(b)(1)(B)& (D). It also indicated that the uniform policy should provide for placards. *See* HPS § 3(b)(1)(C). However, Congress did not indicate that no fee should be charged for placards. The regulations under the HPS are also to the same effect. *See* 23 C.F.R. §§ 1235.3, 1235.6. These hortatory suggestions by Congress might be one reason that California has not chosen to impose a fee for the special license plates. It also suggests that Congress did not see anything particularly discriminatory in the exaction of a small fee for the issuance of placards, if any were issued at all.

As it is, California has decided to confer upon disabled people the still further benefit of a system under which they can drive or be driven in any automobile at all, and still use the special parking places, as well as take advantage of other special parking benefits. That is, California did set up an optional flexible placard program. That complemented the already optional enforcement program which was designed to assure that spaces would not only be provided, but also that they would remain available. As I see it, nothing in the ADA or the regulations precludes California from making a small charge for those additional benefits.

I, of course, recognize that a disabled person can argue that he does not really care at all about having a vigorous enforcement program, which greatly enhances the opportunities of all disabled people to use the special parking places, and even helps make it possible to confer still further parking privileges upon them. In other words, a disabled person could say, "Fine, just set aside and mark the spaces, but do not force any additional benefits upon me, even at a nominal cost." I do not see any reason to believe that Congress did, or that California or we need to, take that kind of reasoning seriously.

Moreover, I fail to see how a charge of twenty-five cents per month, which accords all of those benefits above and beyond the bare provision of spaces, can be dubbed a violation of the ADA on the theory that the costs of state programs that are required to preclude discriminatory treatment have been placed upon disabled persons. No cost of a generally available program has been so levied; rather an expanded ability to use

the special parking spaces has been afforded. With or without enhancement, the spaces remain, and even they are one step removed from any particular state program as such.

In short, the placard enhancement allows for great flexibility in the use of the special spaces, affords even further parking opportunities, and helps assure that the spaces will actually be available for those who need them. The fact that a disabled person, who does not have a car of his own or a car which is used for disabled people most of the time, needs to pay what amounts to twenty-five cents per month to be able to use the special spaces does not put the cost of the parking space program upon him; it only visits a minute part of the cost of the enhancement upon him.

That being said, what of the district court cases which are to the contrary? *See Thompson v. Colorado*, 29 F. Supp. 2d 1226, 1231-32 (D.Colo.1998); *Duprey v. Connecticut*, 28 F. Supp. 2d 702, 709-11 (D.Conn.1998); *Thrope v. Ohio*, 19 F. Supp. 2d 816, 824-25 (S.D.Ohio 1998); *McGarry v. Director, Dep't of Revenue*, 7 F. Supp. 2d 1022, 1027-29 (W.D.Miss.1998). Those cases appear to presume either that some form of enforcement is required, or that the state has chosen to enhance the availability of spaces and that is the state's problem. *See, e.g., Thompson*, 29 F. Supp. 2d at 1232; *Duprey*, 28 F. Supp. 2d at 709. As already noted, I see no violation centered on the fact that a state has exacted a small charge for the purpose of enhancing the benefits available to disabled persons beyond those absolutely required by law. I, therefore, do not accept that particular form of reasoning. The

district court cases also note that without placards the program could not be as flexible as it is because, for example, a disabled person who is being driven in another person's car could not confer the right to park in a special space upon the driver. *See, e.g. Thrope*, 19 F. Supp. 2d at 825; *McGarry*, 7 F. Supp. 2d at 1028. Moreover, they say, a disabled person may wish to rent or borrow a car, which did not have a special license plate, and would not have access to a special space in that instance. And, they say, free license plates do not help in those regards.[1] *See id.* Again, that puts the cart before the horse. It assumes that the state must not only make spaces available, but also provide for all possible permutations of desire to use those spaces, without asking for any fee to help defray the cost of the enhanced usage possibilities. I see no persuasive basis for that assumption. It simply fails to recognize that the states are not discriminating against disabled people when they undertake to police the use of spaces, nor are they discriminating when they ask for a small fee to enable them to do that policing in an efficient fashion. There is, by the way, nothing before us to suggest that the fee exceeds that which the DMV charges other people for services it performs for them, or that the fee is in an excessive or discriminatory amount whose design injures disabled people. Far from it. The fee does not even cover the cost of issuing the

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1 It is interesting to note that a somewhat ambiguous opinion letter from the DOJ suggested that a free license plate program was a satisfactory alternative to a placard program. See DOJ Opinion Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division to Congressman C.W. Bill Young, (Apr. 29, 1996). I, however, do not put any significant weight upon that missive.

placards.[2]

In fine, the ADA is an anodyne which serves to assuage some of the sufferings of disabled persons. California does not disagree with that general goal, and insists that it did not deprive disabled persons of any rights when it imposed a nominal fee upon those who sought to obtain parking placards, which provide great flexibility in the use of the special parking spaces that California has already made available. I agree with that assessment of the situation, and determine that the district court abused its discretion when it issued the permanent injunction against the DMV.

In reaching my conclusion, I limit myself to the facts at hand--a fee that comes to twenty-five cents per month to help defray the cost of issuing the placard. I do not reflect upon whether the state could charge a vastly greater sum for the placards. Nor do I consider other programs or fees charged for them. Nor, for that matter, do I consider whether the federal government can constitutionally impose program costs upon the states in this fashion. As I see it, those issues are, for now,

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2 The best argument against this small and reasonable placard fee is, it seems to me, that there are some disabled people who can drive most cars and who wish to borrow or rent cars from time to time. They are, I believe, the only ones who can reasonably complain at all about the fee in any event. But even if the fee were invalid as applied to them, that would not justify the breadth of the injunction issued by the district court and approved of today.

beyond our ken.[3]

Thus, I respectfully dissent.

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3 It should be pointed out, however, that one Court of Appeals and at least one District Court have declared that an attempt to enforce the surcharge regulation in federal court violates the Eleventh Amendment. See Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698, 706-08 (4th Cir.1999); Hedgepeth v. Tennessee, 33 F.Supp.2d 668, 674-77 (W.D.Tenn.1998); see also Alsbrook v. City of Maumelle, No. 97-1825, 1999 WL 521709, at *7 (8th Cir. July 23, 1999) (en banc). But cf., Clark v. California, 123 F.3d 1267, 1269-71 (9th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 2340, 141 L.Ed.2d 711 (1998). Again, I see no need to decide that issue in this case. If I did, I am inclined to agree with those courts rather than with the majority.

Supreme Court, U.S.
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No. 99-424

In the Supreme Court of the United States

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, AND RUSSEL ANDERSON, ETC., PETITIONERS

AND

UNITED STATES OF AMERICA

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General
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QUESTION PRESENTED

A regulation promulgated by the Department of Justice to implement Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165, prohibits a "public entity" from placing a "surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by" the Americans with Disabilities Act. 28 C.F.R. 35.130(f). The question presented is:

Whether Congress's general authorization for the promulgation of 28 C.F.R. 35.130(f) reflects a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate the States' Eleventh Amendment immunity from suit, as applied to prohibit a state surcharge for handicapped parking placards.

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In the Supreme Court of the United States

No. 99-424

WILLIE M. BROWN, DAVID S. BAGLEY, JOAN BAGLEY, ORRIS CROSS, AND RUSSEL ANDERSON, ETC., PETITIONERS

AND

UNITED STATES OF AMERICA

v.

NORTH CAROLINA DIVISION OF MOTOR VEHICLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A24) is reported at 166 F.3d 698. The opinion of the district court (Pet. App. A25-A44) is reported at 987 F. Supp. 451.

JURISDICTION

The court of appeals entered its judgment on February 12, 1999. A petition for rehearing was denied on May 11, 1999. Pet. App. A45-A46. On August 2, 1999, the Chief Justice extended the time for filing a petition

until September 8, 1999, and the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employ-

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[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

ment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

* * * * *

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, in-

cluding the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).[2] The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2182 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity

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[2] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), which has governed "any program or activity conducted by any Executive agency" since 1978. In addition, Congress has extended the obligations of the Disabilities Act to itself. See 2 U.S.C. 1331(b)(1) (Supp. IV 1998).

from private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

Unlike Titles I and III, Title II does not explicitly delineate all the different types of actions that constitute "discrimination." Instead, Congress instructed the Attorney General to issue regulations implementing the provisions of Title II. See 42 U.S.C. 12134(a); see also 28 C.F.R. Pt. 35 (Attorney General's regulations). The Attorney General's regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5); see 28 C.F.R. 35.151(c) (incorporating standards).[3] Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary in order to assure

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[3] 28 C.F.R. 35.151(c) permits public entities subject to Title II to select between these standards and the Uniform Federal Accessibility Standards, 41 C.F.R. Pt. 101-19.6, App. A. With respect to parking requirements, the two sets of standards are virtually identical, see 41 C.F.R. Pt. 101-19.6, App. A, §§ 4.1.2(5), 4.6.

that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150. The regulations additionally direct that a

> public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 C.F.R. 35.130(f).

2. Respondent permits cars to park in parking spaces reserved for "handicapped persons" only if the car has a special license plate or removable windshield placard that indicates that the car is being used to transport a person with a mobility impairment. Pet. App. A4. It is otherwise a crime to park in the spots designated for handicapped persons. See N.C. Gen. Stat. § 20-37.6(e)(1) (1993). Respondent charges no extra fee for the issuance of handicapped license plates, but, consistent with state law, charges a fee of five dollars for a handicapped parking placard, which is valid for five years. Pet. App. A4.

Petitioners are persons with disabilities who paid a five-dollar fee to receive placards so that they could park in accessible parking spaces. Pet. App. A5. They alleged that the fee violated 28 C.F.R. 35.130(f), and sought declaratory and injunctive relief, and a refund of all fees on behalf of themselves and a class of similarly situated persons. *Ibid.*

The district court held that the Eleventh Amendment barred the suit and dismissed the action. Pet. App. A25-A44. The court found that Congress clearly intended to abrogate Eleventh Amendment immunity,

id. at A31, but that Congress lacked the power to do so because Title II of the Disabilities Act exceeded its remedial power under Section 5 of the Fourteenth Amendment. *Id.* at A31-A41.

3. On appeal, the United States intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Congress's abrogation of the States' Eleventh Amendment immunity.[4] The court of appeals affirmed, but on narrower grounds than the district court. Pet. App. A1-A20. Rather than examine the constitutional validity of Title II as a whole, the court of appeals examined "the legality of the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court," because "the statute itself—which may speak only in general terms—may be facially constitutional, despite the fact that the regulations promulgated under it are unconstitutional." *Id.* at A11, A12. The court then held that Congress clearly intended in the Disabilities Act to abrogate Eleventh Amendment immunity. *Id.* at A12. But the court determined that, when 28 C.F.R. 35.130(f) "prohibits a state from charging even a modest fee to recover the costs of its efforts to aid the handicapped, [it] lies beyond the remedial scope of the Section 5 power." Pet. App. A13. This was so, the court reasoned, because Congress had not identified any evidence in the "legislative record" that "state surcharges for handicapped programs are motivated by animus." *Id.* at A18. The court of appeals did not

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[4] Because it found it lacked jurisdiction, the district court did not reach the question whether respondent's placards are "measures * * * required by the [Disabilities] Act" within the meaning of 28 C.F.R. 35.130(f). The United States took no position on the merits of petitioners' claims.

address the validity of the Disabilities Act's abrogation of Eleventh Amendment immunity with respect to any other aspect of Title II. *Id.* at A20 n.*.

Judge Murnaghan dissented. Pet. App. A21-A24. In his view,

> [i]t makes no more sense to allow states to recoup from the disabled the costs of providing the remedial programs needed to fully integrate them into society than it would, for example, to permit universities receiving federal funding to charge women higher tuition rates to cover the costs of complying with Title IX of the Civil Rights Act of 1964. The goal is to help the victims of discrimination, not to heap more discriminatory treatment upon them.

Id. at A24.

ARGUMENT

Petitioners are correct (Pet. 4) that the question whether the Disabilities Act's abrogation of the States' Eleventh Amendment immunity constitutes a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment is an important question and one on which there is a direct conflict in the circuits. Indeed, two petitions are currently pending before this Court in which that question is raised and in which decision of that question would be dispositive of the Eleventh Amendment inquiry. See Supplemental Brief for the United States, *Florida Dep't of Corrections* v. *Dickson*, No. 98-829; Brief for the United States, *Alsbrook* v. *City of Maumelle*, No. 99-423. In each of those cases, we have suggested that the petition for a writ of certiorari be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-

796, and *Kimel* v. *Florida Board of Regents*, No. 98-791, which cases concern the validity of Congress's abrogation of Eleventh Amendment immunity in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* Within fourteen days of the decision in those cases, the United States has proposed to submit a supplemental filing containing its views, in light of that ruling, as to the appropriate disposition of the pending petitions concerning the constitutionality of the Disabilities Act's abrogation provision.[5]

Similar disposition of the present petition is not warranted, however. This case does not squarely present the broad question of whether the Disabilities Act reflects a proper exercise of Congress's Section 5 power. Rather, it presents only the narrow and relatively infrequently recurring question of whether a particular Department of Justice regulation (28 C.F.R. 35.130(f)), as specifically applied to a limited category of state fees, can validly be enforced against the States in federal court by private parties. Accordingly, further review of this case is not warranted.

1. Petitioners contend (Pet. 10-12) that this Court should grant certiorari to review the conflict in the circuits regarding Congress's power under the Disabilities Act to abrogate Eleventh Amendment immunity. The court of appeals, however, did not decide in this case the broad question on which the courts of appeals are in conflict[6] and of which petitioners seek review.

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[5] Another petition raising the constitutionality of the Disabilities Act's abrogation provision, *DeBose* v. *Nebraska*, No. 99-940, is also pending. The United States has not yet filed its response in that case.

[6] Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), six courts of appeals have held that the abrogation of Elev-

Quite the opposite, the court expressly held only that a particular Justice Department regulation implementing the Disabilities Act, insofar as it prohibits "a modest fee to recover the costs of [the State's] efforts to aid the handicapped, lies beyond the remedial scope of the Section 5 power." Pet. App. A13. Indeed, the Fourth Circuit in this case expressly declined to rule on the statute itself, *id.* at A20 n.*, and the Fourth Circuit

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enth Amendment immunity contained in the Disabilities Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. See *Garrett* v. *University of Ala.*, 193 F.3d 1214 (11th Cir. 1999); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999); *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) ("we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the provision"). The Seventh Circuit also upheld the Disabilities Act's abrogation prior to this Court's decision in *Flores*, *supra*. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997). The question of the continuing validity of *Crawford* is currently pending in *Erickson* v. *Board of Governors of State Colleges and Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Oct. 1, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard Apr. 27, 1999). The constitutionality of the Disabilities Act's abrogation is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument was held on October 24, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933. Only the Eighth Circuit, in a sharply divided opinion, has ruled that the Disabilities Act's abrogation provision is invalid. *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc, with four judges dissenting), petition for cert. pending, No. 99-423.

subsequently *upheld* the Disabilities Act's abrogation of immunity in another Title II case, limiting *Brown* to its facts. See *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212, 221 n.8 (4th Cir. 1999). This case thus presents no occasion for the Court to decide whether Title II of the Disabilities Act—as opposed to a particular application of a Justice Department regulation—reflects a proper exercise of Congress's Section 5 power.

2. Nor does the narrower question of whether the individual regulation, 28 C.F.R. 35.130(f), falls within the Section 5 power merit this Court's review, for three reasons.

First, the case presents only the question of whether the regulation *as applied* to the narrow circumstances presented here—"a modest fee to recover the costs of [a State's] effort"—falls within the Section 5 power. The court of appeals eschewed an across-the-board analysis of whether the federal government could, under its Section 5 power, prohibit certain categories of charges for the costs of providing required services to persons with disabilities. See Pet. App. A18 (concluding that "[i]t may well be that some subset of those surcharges is in fact" "motivated by animus toward the class," but finding that rationale inapplicable to "a modest cost-recovery mechanism rationally employed to recoup the costs of programs aimed at assisting persons with disabilities"). The court of appeals' decision thus involved the distinctly limited question of whether a regulation as applied to a particular factual scenario fell beyond the Section 5 power. Such narrow rulings generally do not warrant an exercise of this Court's certiorari jurisdiction.

Second, a necessary antecedent to adjudicating the question petitioners present for review is the non-

constitutional issue of whether, as a matter of regulatory interpretation, parking placards for disabled persons are "required to provide that individual or group with the nondiscriminatory treatment required by the [Disabilities Act]." 28 C.F.R. 35.130(f). That is an interpretive question about which there is substantial debate. Compare *Dare* v. *California*, 191 F.3d 1167, 1172-1173 (9th Cir. 1999), with *id.* at 1177-1181 (Fernandez, J., dissenting).[7] Yet the court of appeals did not address that interpretive issue in its decision. Nor is there any conflict in the circuits on that question that would warrant this Court's review. Petitioners, in fact, do not even present that interpretive question for this Court's review. But "[i]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the petition asks this Court to "anticipate a question of constitutional law in advance of the necessity of deciding it," *id.* at 346, further review should not be granted.[8]

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[7] The Justice Department has not yet expressed a view on the matter.

[8] We recognize that the Court traditionally favors the resolution of jurisdictional questions before the merits of parties' claims are addressed. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-102 (1998). That precept does not translate readily to jurisdictional objections based on the Eleventh Amendment, however, for two reasons. First, as this Court has explained, the Eleventh Amendment does not operate like a traditional limitation on subject matter jurisdiction:

> The Eleventh Amendment * * * does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can

Third, this case presents a potential bar to federal jurisdiction separate and apart from the Eleventh Amendment question presented. The Tax Injunction Act, 28 U.S.C. 1341, denies federal courts jurisdiction over actions to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Respondent argued in both the district court and the court of appeals that the Tax

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waive the defense. Nor need a court raise the defect on its own.

Wisconsin Dep't of Corrections v. *Schacht*, 524 U.S. 381, 389 (1998) (citations omitted); see also *id.* at 394-395 (Kennedy, J., concurring).

Second, in deciding the jurisdictional question of whether Eleventh Amendment immunity has been validly abrogated pursuant to Congress's Section 5 power, the legal test adopted by this Court requires, as a prerequisite, a meaningful analysis of the operation of the Section 5 legislation (or regulation). This is because a valid abrogation requires a clear intent to abrogate and ascertaining that intent requires an interpretation of the statute. See *Seminole Tribe*, 517 U.S. at 55-57. It also requires that Congress possess the power to abrogate, and when that power is asserted under Section 5 of the Fourteenth Amendment, the constitutionality of the abrogation turns upon whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520. Especially with respect to statutes (or regulations, like the one at issue here) for which there is no established body of interpretive law to draw upon, it will often be difficult to assess the law's constitutionality—its congruence and proportionality—without first determining the substantive scope of its operation. Indeed, the court of appeals found the Justice Department's regulation to be incongruent and disproportionate—and thus an unconstitutional abrogation of immunity—based solely on the assumption that the regulation embraces the type of placard fees at issue here. See Pet. App. A17-A19.

Injunction Act barred petitioners' federal-court action because the "purpose of the charge for the placard is to raise money to pay for governmental operations through the Highway Fund, rather than recovering specifically the cost of supplying the placard." Resp. C.A. Br. 30-31. While the United States takes no position on the ultimate question of the Tax Injunction Act's applicability,[9] the existence of such a non-constitutional jurisdictional question stands as an additional potential obstacle to the Court's resolution in this case of the constitutional question for which petitioners seek review.[10]

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[9] There is an obvious tension between respondent's characterization of the fee for purposes of its Tax Injunction Act argument as a "revenue generator" whose purpose is *not* to "recover[] specifically the cost of supplying the placard," Resp. C.A. Br. 30, 31, and respondent's characterization of its fee for purposes of its Disabilities Act argument, Br. in Opp. i (fee is imposed "to defray the cost of voluntarily providing 'handicapped' windshield placards").

[10] Moreover, the resolution of petitioners' claims may have little practical impact for them, because they currently have pending a state court action that raises the identical Disabilities Act allegations presented in this case and seeks declaratory and injunctive relief and refund of the collected fees. Although *Alden* v. *Maine*, 119 S. Ct. 2240 (1999), held that Congress's Article I power is insufficient to abrogate the States' sovereign immunity to suits in their own courts, there is a substantial basis to believe that respondent has waived its immunity to such suits. First, as respondent conceded below (Resp. C.A. Br. 31-32), the North Carolina Administrative Procedures Act, N.C. Gen. Stat. § 150B-43 (1995), permits individuals in petitioners' position to challenge the validity of the parking placard fee in state court. In addition, North Carolina has a specific provision that permits a person who pays under protest a "tax" involving motor vehicles to sue in state court for a refund See N.C. Gen. Stat. § 20-91.1 (1993); cf. *Cedar Creek Enters., Inc.* v. *North Carolina Dep't of Motor Vehicles*, 226 S.E.2d

In their supplemental brief, petitioners note that the Ninth Circuit, in *Dare* v. *California*, *supra*, reached the opposite conclusion from the court of appeals here as to whether Congress validly abrogated the States' Eleventh Amendment immunity for suits that challenge parking placard surcharges. The existence of such an inter-circuit conflict, while obviously relevant to this Court's discretionary exercise of its certiorari jurisdiction, does not independently warrant review in this case, both because of the narrow and limited impact of the courts' rulings and because of the other potential procedural and jurisdictional barriers to review discussed above.

Furthermore, the conflict between the Ninth Circuit and the court of appeals' decision here concerns not the broad question of the constitutionality of Title II, or even whether the regulation alone as applied to parking placard fees was a valid exercise of Congress's Section 5 authority, but whether courts should examine the constitutional validity of Title II as a whole or on a regulation-by-regulation basis. Compare Pet. App. A9-A12 with *Dare*, 191 F.3d at 1176 n.7. While petitioners suggest at one point (Pet. 9) that the Fourth Circuit

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336, 338-339 (N.C. 1976) (construing term "tax" broadly so as to apply to a penalty imposed for violating weight limit). While both provisions impose exhaustion requirements before suit can be filed, even if respondents did not comply with those requirements in all respects, they are not jurisdictional and can be waived by the courts when the equities require. See *Bailey* v. *North Carolina*, 500 S.E.2d 54, 74-76 (N.C. 1998) (state law that taxpayers pay the tax under protest and then seek a refund through administrative procedures before suing in state court need not be followed in all respects once notice is achieved); *Huang* v. *North Carolina State Univ.*, 421 S.E.2d 812, 815 (N.C. Ct. App. 1992) (failure to comply with Administrative Procedures Act's exhaustion requirement can be excused).

erred in examining the regulation alone as applied to parking placard fees instead of in the context of the entire statute, their concession (Pet. 10 (emphasis added)) that their claims "hinge on the constitutionality of *both* the statute and the regulation" indicates that the focus of their challenge is not on the Fourth Circuit's approach, but on the result to which it led in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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